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No. _____

In The

Supreme Court of the United States

October Term, 1994

INTERNATIONAL PRIMATE PROTECTION LEAGUE AND ITS MEMBERS, PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS AND ITS MEMBERS, ALEX PACHECO, AND LOUISIANA IN SUPPORT OF ANIMALS AND ITS MEMBERS

Petitioners

versus

ADMINISTRATORS OF TULANE EDUCATIONAL FUND, NATIONAL INSTITUTES OF HEALTH AND THE INSTITUTES FOR BEHAVIOR RESOURCES, INC.

Respondents

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. In a § 1442(a)(1) removal case, may a federal court require the plaintiffs to meet Article III's standing requirements with respect to the state-law claims over which the federal court exercises pendent jurisdiction, or should state standing law apply?

   a. Is satisfaction of Article III's standing requirements a jurisdictional necessity in a § 1442(a)(1) case?

   b. Does the law of the case doctrine allow the circuit court to adhere to its earlier decision, disregarding the undecided, preliminary, and "open" question posed by this Court in the interim?

2. Did the Fifth Circuit properly uphold the removal of this action by Tulane University, allegedly a "person acting under [a federal officer]," the National Institutes of Health ("NIH"), under 28 U.S.C. § 1442(a)(1)?

   a. Is the definition of "person" in § 1442(a)(1) restricted to natural persons or can it extend to an institutional defendant, as the Fifth Circuit ruled?

   b. As a matter of law, is it possible to "act under" an officer who lacks ultimate authority over the acts in question?

   c. Must the federal officer under whom the "person" acted be a natural person, or can "he" be an agency – or even a conglomerate of agencies – as the Fifth Circuit found?

LIST OF PARTIES

1. International Primate Protection League and Its Members – Petitioners
2. People for the Ethical Treatment of Animals and Its Members – Petitioners
3. Alex Pacheco – Petitioner
4. Louisiana in Support of Animals and Its Members – Petitioners
5. Administrators of Tulane Educational Fund – Respondent
6. National Institutes of Health – Respondent
7. Institutes for Behavior Resources, Inc. – Respondent

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PETITION FOR A WRIT OF CERTIORARI

The Petitioners, International Primate Protection League and its members, People for the Ethical Treatment of Animals and its members, Alex Pacheco, and Louisiana in Support of Animals and its members, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the

Fifth Circuit, entered in the above-entitled proceeding on May 9, 1994.

OPINION BELOW

The *per curiam* opinion of the United States Court of Appeals for the Fifth Circuit in *International Primate Protection League v. Administrators of Tulane Educational Fund, et al.*, rendered on May 9, 1994, is set forth in the Appendix at A-1 through 4. Pursuant to Rule 47.5 of the Local Rules of the Fifth Circuit Court of Appeals, the court determined that its opinion should not be published.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on May 9, 1994 (A-1). The order denying a petition for rehearing and suggestion for rehearing *en banc* was entered on June 9, 1994 (A-13). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

28 U.S.C. § 1442(a)(1) provides in pertinent part:

> (a) A civil action or criminal prosecution commenced in a state court against any of the following persons may be removed by them . . .
>
> (1) any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on

account of any right, title or authority claimed under any act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

STATEMENT OF THE CASE

Petitioners, organizations and individuals seeking the humane treatment of animals, brought this action to halt fraudulent experimentation on and the unnecessary killing of a group of macaque monkeys who have become popularly known as "the Silver Spring Monkeys." The animals are owned by the Institutes for Behavior Resources, Inc. ("IBR"), which subjected them to experimentation under a grant funded by the National Institutes of Health ("NIH"). A 1981 police raid on IBR's laboratory exposed cruelty to the animals that resulted in a criminal prosecution of the experimenter Dr. Taub, and the termination of NIH's grant to IBR. NIH took custody of the monkeys with the consent of IBR, which retained ownership. Amid mounting pressure for the monkeys' release to a sanctuary, in 1986 NIH secretly transferred them, with IBR's consent, to the Tulane Primate Research Center, which, in its own words, offered a "rural location" at "a private university . . . located in the conservative south, where the animal rights movement is not strong." In order to put an end to the controversy surrounding the monkeys, the biomedical community planned, with IBR's consent, to kill them under cover of a lethal experiment. Dr. Mishkin, an employee of the National Institute of Mental Health ("NIMH"), and a

colleague and ardent defender of the criminally-prosecuted Dr. Taub, designed the experiment at his home, over a weekend. When plans to implement the experiment were made public, some of the nation's foremost scientists decried it as a scientific fraud, but the experimenters were not deterred, as their principal objectives were political, not scientific.

Availing themselves of strong remedies provided by Louisiana law to protect against cruelty towards animals, in 1988 Petitioners filed suit in the Civil District Court for the Parish of Orleans, seeking injunctive relief and damages. Named as defendants were IBR, Tulane, and NIH. The state court immediately issued a temporary restraining order blocking the killing of the animals.

NIH removed the case to federal court under the federal officer removal statute, 28 U.S.C. § 1442(a)(1), and the federal district court continued the TRO in effect. An appeal was taken to the Fifth Circuit, which upheld NIH's removal and found, applying Article III standing guidelines, that Petitioners lacked standing; the case was ordered to be dismissed. 895 F.2d 1056 (5th Cir. 1990).

This Court granted a writ of certiorari, restricting its review to the question whether § 1442(a)(1) permits removal by federal agencies such as NIH. Concluding that it did not, the Court ordered the case remanded to state court. *International Primate Protection League v. Administrators of Tulane Educational Fund*, 500 U.S. 72, 111 S.Ct. 1700 (1991). On remand, defendant Tulane filed a second removal petition, claiming to be a "person acting under" a federal officer within the meaning of § 1442(a)(1). On November 2, 1992, the district court

upheld the removal, concluding, on the strength of the defendants' submissions of fact, that Tulane was a "person acting under" the Director of NIH. Relying on the Fifth Circuit's earlier holding that Petitioners lacked Article III standing, the court entered summary judgment dismissing the case. (A-5, A-6 *ff.*).

Affirming the decision below, the Fifth Circuit upheld Tulane's removal, but recognizing the dearth of factual support for a conclusion that Tulane had acted under NIH's director, the court found that Tulane was a "person acting under" NIH, the agency. (A-2-3). The Fifth Circuit also affirmed the ruling that Petitioners could not satisfy Article III's requirements for standing. (A-4). Like the district court, it relied upon its 1990 holding on standing as the law of the case, thereby sidestepping the question expressly raised by this Court in its intervening decision: "whether a federal court in a § 1442(a)(1) removal case may require plaintiffs to meet Article III's standing requirements with respect to the state law claims over which the federal court exercises pendent jurisdiction." 500 U.S. at 78, n. 4, 111 S.Ct. at 1775, n. 4.

Petitioners return to this Court seeking an answer to this important open question, and challenging the propriety of Tulane's § 1442(a)(1) removal of the action.

REASONS FOR GRANTING THE WRIT

I. PETITIONERS WERE IMPROPERLY REQUIRED TO MEET ARTICLE III's STANDING REQUIREMENTS WITH RESPECT TO THEIR STATE LAW CLAIMS

A. The objectives of § 1442(a)(1) are disserved by the application of Article III standing requirements

The purpose of 28 U.S.C. § 1442(a)(1) is to provide a federal forum for the adjudication of federal defenses. *Willingham v. Morgan*, 395 U.S. 402, 409 (1968). A federal defense must be asserted, because it is the federal officer's substantive defense that 'arises under' federal law and provides the Article III basis for removal jurisdiction. *Mesa v. California*, 489 U.S. 121, 136, 109 S.Ct. 968 (1989). In this case, the asserted federal defense is sovereign immunity. In the six year life of this litigation, however, the merits of the federal defense have never been reached by any court because Petitioners' claims have repeatedly been dismissed for want of Article III standing. From the outset, Petitioners have protested the impropriety of applying Article III standing requirements to their state-law claims, and the injustice of a dismissal by the federal courts without any adjudication of the alleged federal defense that provided the sole basis for federal jurisdiction.

This argument concerning the misapplication of Article III standing requirements to Petitioners' claims was completely disregarded by the federal courts until this Court declared in a footnote:

> Our grant of certiorari did not extend to the Court of Appeals' determination that Petitioners lack standing to protect the monkeys. We therefore leave open the question whether a federal court in a § 1442(a)(1) removal case may require Petitioners to meet Article III's standing requirements with respect to the state-law claims over which the federal court exercises pendent jurisdiction. See *Mesa v. California*, 489 U.S. 121, 136 (1989) (basis for removal jurisdiction under § 1442(a)(1) is the federal officer's substantive defense that "arises under" federal law). See also *Arizona v. Manypenny*, 451 U.S. 232, 242 (1981) ("[I]nvocation of removal jurisdiction by a federal officer . . . is a purely derivative form of jurisdiction, neither enlarging nor contracting the rights of the parties" (footnote omitted)); *Id.*, at 242, n. 17, 101 S.Ct. at 1665, n. 17 ("This principle of derivative jurisdiction is instructive where, as here, relevant state- court jurisdiction is found to exist and the question is whether the federal court in effect loses such jurisdiction as a result of removal").

500 U.S. at 78-79, n.4, 111 S.Ct. at 1705, n.4.

Defendants treated Petitioners' argument for the application of state standing guidelines as an effort to undermine the constitution. The district court agreed, stating that

> standing to sue in any Article III court is a federal question which does not depend on the party's prior standing in state court.

(A-9-10; citation omitted).

Petitioners pointed out that because this was already an Article III case by virtue of the federal defense, dispensing with Article III's standing requirements would have no jurisdictional consequence. Since *Tennessee v. Davis*, it has been recognized that the Article III basis for removal jurisdiction is the federal officer's substantive defense that 'arises under' federal law. *Mesa v. California*, 489 U.S. 121, 136, 109 S.Ct. 959, 968 (1989). Thus in the present case, it is not Petitioners' claims but the assertion of federal defenses that establishes the Article III jurisdiction of the federal courts (if it exists). Once the nature of the Article III "case" is understood, the inapplicability of Article III standing requirements becomes abundantly apparent. The insistence that Petitioners satisfy the Article III requirements for a "case or controversy" overlooks the quite fundamental absence of any federal claim.[1] It makes no more sense to apply federal standing doctrine to Petitioners' state law claims than it would to require that they assert a federal claim, name the United States as a party, or establish diversity of citizenship in order to comply with the requirements of Article III. **Petitioners have not brought an Article III case; defendants have. Petitioners cannot logically be required to establish Article III standing to pursue what are not Article III claims.** In *Asarco Inc. v. Kadish*, 490 U.S. 605, 109 S.Ct.

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[1] By contrast, in *Maine Assn. of Interdependent Neighborhoods v. Commissioner, Maine Dept. of Human Services*, 876 F.2d 1051 (1st Cir. 1989), the case was removed to federal court under § 1441(b) (original jurisdiction removal), and constitutional standing requirements were applied. *IPPL* noted that the application was appropriate in *M.A.I.N.* because of the § 1441(b) jurisdictional base. 500 U.S. at 88, n. 9, 111 S.Ct. at 1710, n. 9.

2037 (1989), the Court found that the plaintiffs' lack of Article III standing in an action prosecuted in state court under a federal statute did not prevent the review, on a writ of certiorari filed by the defendants, of a federal question. That federal question, said the Court, presented a justiciable case or controversy, and the plaintiffs' lack of Article III standing did not alter that fact because the plaintiffs were "not the party attempting to invoke the federal judicial power." 490 U.S. at 618. The same principle applies here.

The imposition of Article III requirements on state-law claims would not only fail to satisfy any jurisdictional necessity, it would also fail to serve any other federal purpose. As noted above, the purpose of the removal statute is to provide a federal forum for the adjudication of federal defenses. *Willingham v. Morgan, supra.* That purpose would not be furthered by the application of federal standing law, a defense this Court has explicitly said the removal statute has no concern for protecting. *IPPL*, 500 U.S. at 86, n. 7, 111 S.Ct. at 1709, n.7.

Beyond the provision of a federal forum, the removal statute has no interest in displacing the rights of the states. *Tennessee v. Davis*, 100 U.S. at 271, early established that state substantive law would apply in removed actions, and the Court later emphasized that removal jurisdiction is "purely derivative . . . , neither enlarging or contracting the rights of the parties." *Mesa v. California*, 489 U.S. at 136, 109 S.Ct. at 968; *Arizona v. Manypenny*; 451 U.S. 232, 247, 101 S.Ct. 1657, 1664 (1981).

The application of Article III's more rigorous standing requirements, resulting in the dismissal of Petitioners'

claim, has not only severely contracted their rights but also has thwarted the enforcement of Louisiana's policies and laws on the humane treatment of animals – an area the federal government has specifically consigned to state regulation.[2] Louisiana law, which does not burden those asserting claims of animal cruelty with the requirements imposed by the courts below, was rewritten into oblivion by the removal of this case. As this Court has frequently observed, the constraints of Article III do not apply to state courts, see *Asarco Inc. v. Kadish, supra*; and Louisiana has fashioned a far more liberal standing policy than that obtaining in the federal courts. The supplanting of state standing law by federal law in the analysis of state law claims does violence to the objectives of § 1442(a), which was designed to provide a federal forum for a federal defense that has never been reached in this case.

This Court's citation of *Arizona v. Manypenny* in its "open question" footnote strongly suggested that Article III standing requirements should not be applied to Petitioners' state law claims. In *Manypenny*, a federal officer's assault prosecution was removed to federal court under § 1442(a). The officer was acquitted and the state sought to appeal, a right under Arizona law that was not accorded by federal law. In determining whether to allow the appeal, the Court reviewed the historical purpose of § 1442 to ensure a federal forum for a federal officer's

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[2] In enacting the Animal Welfare Act, 7 U.S.C. § 2116 *et seq.*, Congress acknowledged that it was taking only "a very small first step toward the elimination of cruelty, mistreatment, and abuse of laboratory animals," 112 Cong. Rec. 19, 785 (1966) and invited the states to fill the gap. 7 U.S.C. § 2143(a)(8).

federal defenses. Federal jurisdiction under § 1442 is derivative, the Court found, and a state proceeding does not "arise under federal law" in the sense that it preempts state law. Rather, federal procedural law is applied without "revis[ing] or alter[ing] the underlying [state] law to be applied." *Id.* at 241-242. "This principle of derivative jurisdiction is instructive" said the Court, "where, as here, relevant state-court jurisdiction [over the appeal] is found to exist and the question is whether the federal court in effect loses such jurisdiction as a result of removal." *Id.* at 242 n.17. Because the policies supporting removal were fully vindicated by the provision of a federal forum, there was no need for further interference in state law by restricting rights the parties would have enjoyed under state law. Accordingly, the Court upheld the state's right of appeal.

To cite the "instructive . . . principle of derivative jurisdiction" from *Manypenny* on the analogous question of the applicable standing requirements after removal was perhaps to provide the answer. *See IPPL*, 111 S.Ct. at 1705 n.4. Just as in *Manypenny*, it may be said here that "relevant state-court jurisdiction is found to exist and the question is whether the federal court in effect loses such jurisdiction as a result of removal." Because federal jurisdiction here is derivative, does not arise under state law in the sense that it preempts state law, and is not meant to enlarge or contract the rights of the parties, it cannot apply to deprive the Petitioners of a forum for their claims under Art. III standing requirements, with whose protection the removal statute "is not concerned."

For this reason, Wright, *et al.* have opined that where questions of state law are presented to federal courts,

state standing law applies. 13A *Federal Practice and Procedure: Jurisdiction 2d* § 3531.14 at 84. *See also, Ferency v. Austin*, 493 F. Supp. 683,690 (W.D. Mich. 1980).

If Tulane is entitled to remove at all, which is doubtful, the objective of § 1442(a)(1) will have been fully realized by the provision of a federal forum for the alleged federal defenses. Further application of Article III standing requirements would enforce federal interests not entitled to protection, in violation of the derivative nature of removal jurisdiction under § 1442(a)(1) and in improper abrogation of state policies at work here. Because § 1442(a)(1) is not designed to enlarge or contract the rights of the parties, the application of federal standing requirements, resulting in a dismissal of Petitioners' claims without any adjudication of defendants' federal defenses, was a perversion of the statute's intent and an improper exercise of federal jurisdiction in derogation of Louisiana law.

B. The law of the case rule was inapplicable here

The "open question" posed by this Court has not been answered. The district court bypassed it, ruling that it "[could] not ignore the fact that the Fifth Circuit has already decided in this very case . . . that these Petitioners do not meet the constitutional requirements for standing . . . " (A-10). Tearing a page from the same book, the Fifth Circuit ruled that it was "bound by [its] previous holding under the 'law of the case' doctrine." (A-4). Accordingly, the court found that Petitioners lack standing and that their suit was properly dismissed. *Id.*

The application of the law of the case doctrine was improper for several reasons. First, the Fifth Circuit's earlier decision was reversed by this Court, and therefore should not have been given precedential value. It is beyond cavil that "to vacate a judgment is to take away from it any precedential affect [sic]," so that it cannot operate as the law of the case. *Falcon v. General Telephone Co.*, 815 F.2d 317, 320 (5th Cir. 1987). *See also, Johnson v. Bd. of Education of Chicago*, 457 U.S. 52, 102 S.Ct. 2223, 2224 (1982). The court declared, however, that this Court, having reversed the ruling on federal jurisdiction, "left intact our ruling on standing." (A-4). This conclusion is subject to question. This Court did not simply reverse the jurisdictional holding, but reversed "the *decision* of the Court of Appeals" with instructions that the case was to be remanded to state court, 111 S.Ct. at 1710, where, the Court had previously noted, state standing requirements would plainly apply. 111 S.Ct. at 1705, n.4, 1709, n.7. There was no reason for this Court to address the Fifth Circuit's holding on standing, because the remand to state court obviated the need for any consideration of Petitioners' standing under Article III. The distinction between reversal and vacation of a judgment in this context is difficult to discern. See *U. S. v. Simmons*, 923 F.2d 934, 956 (2d Cir.) *cert. denied*, ___ U.S. ___, 111 S.Ct. 2018 (1991) (Supreme Court reversal prevented application of law of the case doctrine). And the finding that this Court "left intact" a ruling it held the Fifth Circuit had no jurisdiction to enter[3] seems particularly dubious.

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[3] This Court's holding that NIH's removal was statutorily unauthorized necessarily stripped the federal courts of jurisdic-

Additionally, this Court's decision – even if it could be said to have left the standing ruling technically "intact" – cannot in any way be seen as an endorsement of that ruling. To the contrary, this Court specifically called into "open question" the matter of whether the Article III analysis employed by the Fifth Circuit was applicable. 111 S.Ct. 1705, n.4. Thus, adherence to the previous holding on standing as the law of the case violated one of the most fundamental precepts of that doctrine: *the law of the case comes into play only with respect to issues previously determined. Quern v. Jordan*, 440 U.S. 332, 347, n. 18, 99 S.Ct. 1139, 1148, n. 18 (1979); *Pegues v. Morehouse Parish School Bd.*, 706 F.2d 735, 738 (5th Cir. 1983); *Key v. Wise*, 629 F.2d 1049, 1054-1055 (5th Cir. 1980); *Pickens v. Okolona Municipal Separate School District*, 594 F.2d 433, 436 (1979). See also *Nunley v. M/V Dauntless Colocotronis*, 863 F.2d 1190, 1195, 1196 (5th Cir. 1989).

The only standing issue previously determined by the Fifth Circuit was that Petitioners failed to meet Article III standing requirements. Even assuming that that ruling had precedential value, it would not come into operation unless and until the threshold question of the applicability of Article III requirements had been decided affirmatively. If it were decided that Article III standing analysis would *not* apply, the prior decision on standing would have no bearing whatsoever on the determination of Petitioners' standing under state law.

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tion. That meant that the Fifth Circuit lacked subject matter jurisdiction when it determined that Petitioners lacked Article III standing, and that determination should not achieve "law of the case" status.

The intervening decision of this Court amounted to a "controlling authority [which] has since made a contrary decision of law applicable to the issue." See *Falcon, supra* at 320. In such cases, the law of the case cannot be followed. *Id.*

Petitioners do not mean to suggest that a writ of certiorari should be granted to review the Fifth Circuit's misapplication of the law of the case doctrine; rather, that the law of the case doctrine does not bar consideration and decision of the open question whether Petitioners must satisfy Article III standing requirements.

II. THE FIFTH CIRCUIT'S RULING THAT TULANE'S REMOVAL OF THIS ACTION WAS PROPER EXPANDS THE DEFINITION OF 28 U.S.C. § 1442(a)(1) IN A MANNER THAT CONFLICTS WITH THE STATUTE'S INTERPRETATION BY THIS COURT AND BY LOWER COURTS IN OTHER CIRCUITS

A. Only natural persons should be entitled to remove under § 1442(a)(1)

The statute on which Tulane predicated its removal, entitled "Federal Officers Sued Or Prosecuted," provides in pertinent part:

> (a) A civil action . . . commenced in a state court against any of the following persons may be removed by them . . .
>
> (1) any officer of the United States or any agency thereof, or person acting under him . . .

28 U.S.C. § 1442.

After this Court held that defendant NIH was not entitled to remove, defendant Tulane, asserting that it was a "person acting under [an officer of the United States]," filed its removal petition. Tulane had forewarned this Court of its intention to take such action and sought advance approval of it. However, the Court declared:

> whether Tulane will be able to remove the remanded case requires a determination whether it is a "person acting under" the Director of NIH within the meaning of § 1442(a)(1). This mixed question of law and fact should not be resolved in the first instance by this Court, least of all without an appropriate record.

500 U.S. at 89, 111 S.Ct. at 1710.

The issue is now ripe for review. At the outset, the question arises whether a non-natural person such as Tulane falls within the meaning of "person" under § 1442(a). Lower courts have reached differing results on this question.

In *IPPL*, this Court determined that NIH could not be viewed as a "person" acting under its directing officer. This conclusion turned on the awkwardness of NIH's interpretation and on the finding that the term "person" seldom included the sovereign. 500 U.S. at 82, 111 S.Ct. at 1707. The Court did not address the question whether "person" could include non-natural persons.

While the Dictionary Act does not confine the meaning of "person" to natural persons, *See*, 1 U.S.C. § 1, ("In determining the meaning of any act of Congress, unless

the context indicates otherwise . . . the word[] 'person' . . . include[s] corporations, companies, associations, . . . "), the scope of the term depends upon its context: "[t]he word 'person' . . . is not a term of art with a fixed meaning wherever it is used." *Pfizer Inc. v. India*, 434 U.S. 308, 315 (1978).

As this Court observed in *IPPL*, "for more than 100 years prior to 1948, Congress expressly limited whatever removal power it conferred upon federal defendants to individual officers." 500 U.S. at 85, 111 S.Ct. at 1708. The long line of caselaw discussing the history and purpose of the statute make it clear that Congress intended to protect individuals from the local prejudice and harassment to which individuals are peculiarly subject. See *Mesa v. California*, 489 U.S. 121, 109 S.Ct. 959 (1989); *Willingham v. Morgan*, 395 U.S. 402, 89 S.Ct. 1813. The "person acting under him" language first appeared in the current statute, Act of June 25, 1948, ch. 646, § 1442, 62 Stat. 938. The forerunners of § 1442(a)(1) also authorized removal by "persons" assisting a federal officer; however, the distinguishing characteristic of those prior enactments was their restriction of the "person's" activities to the enforcement of specific laws.[4] *See e.g.*, Act of Feb. 4, 1815, Ch. 31, § 8, 3 Stat. 198 (officers enforcing the customs act, " . . . or any other person aiding or assisting, agreeable to the provisions of this act or under colour thereof, for any thing done, or omitted to be done, as an officer of the

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[4] Counsel found no evidence of the application of any of these statutes to non-natural persons, whereas the "acting under" clause of § 1442(a) has been invoked by corporations and associations. See discussion below.

customs . . . "); Act of March 2, 1833, Ch. 57, § 3, 4 Stat. 633 ("any officer of the United States, or other person, for or on account of any act done under the revenue laws of the United States, . . . or for on account of any right, authority, or title set up or claimed by such officer, or other person under any such law of the United States . . . "); Act of Feb. 28, 1871, Ch. 99, § 16, 16 Stat. 438-439 ("any officer of the United States or other person, for or on account of any act done under the provisions of [the Elective Franchise Act]"); Act of 1911, Ch. 231, § 33, 36 Stat. 1097 ("any officer . . . acting by authority of any revenue law . . . , or . . . any person acting under or by authority of any such officer . . . "); Act of 1919, Ch. 85, § 28, 41 Stat. 316 ("The commissioner [under the National Prohibition Act], his assistants, agents, inspectors . . . ").

The present text of the statute was adopted during the 1948 Judicial Code revision, which expanded it to include all federal officers and persons acting under them. The only legislative history on the revision is offered by the House Committee Report:

> The revised subsection . . . is extended to apply to all officers and employees of the United States or any agency thereof. [The predecessor provision] was limited to revenue officers . . .

H.R. Rep. No. 308, 80th Cong., 1st Sess. A134 (1947). See, *IPPL*, 500 U.S. at 84, 111 S.Ct. at 1708.

The comment's reference to a "person acting under" as an "employee" is more consistent with an individual working directly for the government than a corporation acting pursuant to a contractual arrangement. Moreover, had Congress intended to expand the removal power not

only from certain classes of federal officers to all federal officers but also from individuals to all persons – natural or non – contracting with the government, one would expect further comment on so sweeping a change.

Several cases have considered whether § 1442(a)(1) embraces non-natural persons. Two of the most thoughtful analyses, in *Ryan v. Dow Chemical*, 781 F. Supp. 934 (E.D.N.Y. 1992) (certified for appeal), and *Krangel v. Crown*, 791 F. Supp. 1436 (S.D. Ca.), *appeal denied*, 968 F.2d 914 (9th Cir. 1992), reach different results. *Ryan* found the "arid interpretive landscape" unilluminating, and concluded that a corporation, which might be in a position to invoke a federal defense, could remove. 781 F. Supp. at 946. *See also, Pack v. AC&S, Inc.*, 838 F. Supp. 1099 (D.Md. 1993); *Fung v. Avex Corp.*, 816 F. Supp. 569 (N.D. Cal. 1992); *Bahrs v. Hughes Aircraft Co.*, 795 F. Supp. 965 (D. Ariz. 1992). *Krangel*, on the other hand, held that

> the presumption that Congress' definition of the word "person" includes corporations is outweighed in light of the purpose of the statute, the fact that ambiguities should be resolved against federal jurisdiction, and the strong interest of the states in adjudicating the rights and obligations of their citizens.

791 F. Supp. at 1446. *See also, Mignona v. Sair Aviation*, 937 F.2d 37, 41 (2d Cir. 1991) (disallowing removal by a nonappropriated fund instrumentality).

The court in *Bakalis v. Crossland Savings Bank*, 781 F. Supp. 140, 145-146 (E.D.N.Y. 1991), struck a middle ground between *Ryan* and *Krangel*, disallowing the attempted removal by a bank operating under federal

guidelines and holding that when the removing defendant is a corporation "a closer nexus between government and the person seeking removal . . . [is] required."

The Fifth Circuit, without analysis, concluded that Tulane was a "person". *See* A-2. Although its holding does not, strictly speaking, present a conflict among the circuits, the non-appealability of most decisions ordering remand means that the conflict presented here is unlikely to be carried into the circuit courts. *See*, 28 U.S.C. § 1447(d); *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 96 S.Ct. 584 (1976).

The potential expansion of federal jurisdiction to embrace a broad class of federal contractors, and the confusion in the lower courts on this issue suggest that this important question of federal law should be settled by this Court.

B. As a matter of law, a person cannot "act under" a federal officer who lacks ultimate control

The "acting under" requirement of § 1442(a)(1) has generally presented thornier issues of fact than of law. In a fairly comprehensive analysis, the court in *Ryan v. Dow*, *supra*, placed removing defendants along a spectrum between – at one end – those acting under the general auspices of a federal officer or within a federally regulated industry (not entitled to remove) and – at the other end – those acting pursuant to an officer's direct orders or to comprehensive and detailed regulations (entitled to remove); between those poles, said the court, are "numerous close calls." 781 F. Supp. at 947. As noted above, the *Bakalis* court required a "closer nexus" to the

government when the removing defendant is a corporation, 781 F. Supp. at 145, 146. *See also, Krangel v. Crown, supra.*

In finding that the requisite governmental control was exercised here, the Fifth Circuit looked to a 1986 letter agreement signed when NIH transferred the monkeys to Tulane's Primate Center, stating that Tulane was "acting strictly as an aide to NIH in its role as custodian." According to the agreement, Tulane could not make more than routine decisions without obtaining NIH's permission. The court further found (wrongly – see discussion below) that "NIH officials participated in and directed the euthanasia of the monkeys." These facts, the court concluded, adequately supported the district court's "acting under" determination. (A-3).

By this analysis, the Fifth Circuit, like the district court before it, avoided the more difficult legal question: is it possible to "act under" a federal official (assuming for a moment that there is one) who himself lacks control over the actions at issue? The factual question decided by the courts below – that Tulane could not act without NIH's permission – was virtually undisputed. Petitioners' objection to the invocation of § 1442(a)(1) stemmed not from the interrelationship between Tulane and NIH, but from the interrelationship between NIH and IBR, the private company which owns the monkeys and which has iron-fistedly retained authority over them. IBR issued repeated reminders to NIH that it could not take significant actions with regard to the monkeys without IBR's consent. For example, in 1986, IBR issued a written reminder to NIH that "[i]n legal parlance, NIH holds the

primates as a 'bailee' – it has no ownership rights to them." On a later occasion, IBR warned:

> If you authorize or participate in the violation of our property rights by transferring the primates to any person or institution without our approval, we shall hold you personally responsible.

NIH repeatedly acknowledged its "absence of authority to act independently of the owner of the monkeys [IBR]." Indeed, when over 300 members of Congress petitioned NIH to release the animals, NIH plainly stated that it "d[id] not have authority to act independently of the monkeys [sic] owner." On the matters at issue in this case – the life, death, location, and experimental issues – Tulane reported to NIH, which reported to IBR, which alone had the authority to decide the course of action to be taken.

Both the district court and the Fifth Circuit clearly considered the matter of IBR's involvement irrelevant. In both courts, the removal inquiry stopped abruptly with the determination that Tulane acted under NIH. The hundreds of pages of documentary and testimonial evidence addressing the fact that NIH acted under IBR were never discussed.

Because NIH's role in this case has essentially been that of an intermediary, the Fifth Circuit, in looking principally to the letter agreement which says Tulane is NIH's aide, may have allowed the parties to confer federal jurisdiction on Tulane by a document that was more form

than substance.[5] Evidence that Tulane acted under a federal official who had no authority hardly established the federal interest at the heart of a § 1442(a) removal.

Removal under § 1442(a)(1) has always been perceived as an extraordinary remedy, necessary to protect the federal government from state-sanctioned interference. *See, Mesa v. California*, 489 U.S. 121, 126, 109 S.Ct. 959, 963 (1989); *Willingham v. Morgan*, 395 U.S. 402, 406, 89 S.Ct. 1813, 1815 (1969); *Tennessee v. Davis*, 100 U.S. 257, 263 (1880). *Willingham* determined that the validity of the claim that an officer was acting "under color of" office need not be established in order to justify removal – or, in the words of the Court, the officer "need not win his case before he can have it reviewed." 395 U.S. at 407.[6] Where a suit is brought directly against the federal officer, *Willingham's* broad interpretation of the "under color of . . . office" clause, requiring mere assertion of

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[5] Litigants may not confer subject matter jurisdiction by agreement. See *Insurance Corp. of Ire. v. Compagnie des Bauxites*, 456 U.S. 694, 702, 102 S.Ct. 2099 (1982); *California v. LaRue*, 409 U.S. 109, 113 n.3, 93 S.Ct. 390, 394 n.3 (1972).

[6] In *Willingham*, a prisoner tort suit against a federal warden, the Court examined the removal statute's requirement that an officer be sued for an act "under color of . . . office", in light of the prisoner's claim that the warden had been engaged in a "frolic of [his] own." The fact of the alleged "frolic", said the prisoner, defeated removal. The Court disagreed, finding the "under color of" test satisfied by the warden's allegation that his only contact with the prisoner had been in the performance of his official duties. The question of a "frolic", the Court ruled, went to the defenses of official justification and immunity – the very defenses for which the removal statute intended to provide a federal forum. Here, the "acting under" requirement raises a threshhold question of federal interest before the sovereign immunity issue is reached.

a federal defense, clearly effectuates the statutory purpose of protecting the federal government by providing a federal forum for federal defenses. But where, as here, the link to the federal government is more attenuated because removal is sought by a person allegedly acting under an officer, the mere assertion of an immunity defense creates less certainty of the need for the protection of a federal forum.[7] Tulane's removal, premised upon the mere participation, rather than the control of the federal government, has raised the possibility that litigation concerning any activity touched by federal funding or other peripheral federal involvement may be litigated in federal court, regardless of the absence of ultimate government control. Such a result would enlarge the scope of § 1442(a)(1) exponentially and would offer the protection of the federal courts to a broad array of cases in

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[7] Petitioners' showing that NIH had no real authority over Tulane's actions has obvious bearing on the sovereign immunity defense. Indeed, as this Court observed in *IPPL*, the official immunity defense generally hinges on "the crucial question- . . . whether the relief sought in a suit nominally addressed to the officer [was] relief against the sovereign." 500 U.S. at 85, 111 S.Ct. at 1708 (quoting *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 687, 69 S.Ct. 1457, 1460 (1949)). Certainly, the courts below, which gave only the most glancing attention to Petitioners' claims that Tulane was not genuinely acting under a federal officer, apparently considered such an in-depth analysis beyond the scope of their threshold decision on the propriety of removal. One of the most frustrating aspects of this litigation has been that the courts have never addressed the sovereign immunity defense that was theoretically the basis for the exercise of federal jurisdiction here. Dismissed without a hearing, Petitioners have never had the opportunity to show that the "operations of the general government" were not imperilled by their suit.

which the workings of the federal government are clearly not placed in jeopardy.

If Congress had intended to authorize removal of any suit in which a sovereign immunity defense were raised, it could have expressed that intention far more simply than by the protracted language of § 1442(a)(1). The restriction of removal power to an "officer of the United States . . . , or person acting under him, for any act under color of such office . . . " suggests a narrower meaning than "any person asserting a federal defense." As *Willingham* observed, the narrowing of the statute cannot practically come from a pre-screening of the sovereign immunity defense. The statute can, however, be properly curtailed by a restrictive reading of the "acting under" requirement, which would insure a pronounced enough federal interest to warrant the incursion upon the jurisdiction of state courts. In this case, the lower courts' failure to inquire deeply into the "acting under" requirement, combined with their failure to reach the sovereign immunity defense, resulted in the dismissal of Petitioners' state claims to no federal purpose – and on the strength of a standing defense which § 1442(a)(1) "is not concerned with . . . protect[ing]." *See, IPPL*, 500 U.S. at 86 n.7, 111 S.Ct. at 1709 n.7. The rights of Petitioners and the laws of the State of Louisiana were displaced in protection of the private actions of private entities.

The marginal federal interest in this case did not warrant removal, and Petitioners submit that Congress did not authorize removal: a person cannot "act under" a federal officer who lacks control over the project in question.

C. § 1442(a)(1) requires that one "acting under" an officer acts under an individual

The Fifth Circuit moved quickly from a statement that Tulane's removal must be supported by a showing that it acted under a federal *officer* (A-2) to a finding that Tulane had acted under a federal *agency* (A-3).

In interpreting § 1442(a)(1) as authorizing removal only by an individual officer, and not by an agency, this Court implied that a "person acting under him" would likewise have to be acting under an individual officer. Indeed, the Court specifically cited the use of the term "him" as support for its conclusion that the "officer" later described as "him" was an individual, not an agency. *IPPL*, 500 U.S. at 80, 111 S.Ct. at 1706. It further stated, in declining to review Tulane's right of removal, that the issue "requires a determination whether it is a "person acting, under *the Director of NIH . . . '*," again suggesting the need for an individual officer. 500 U.S. at 89, 111 S.Ct. at 1710 (emphasis supplied).

Consistent with this holding, Tulane identified NIH's Dr. Raub as the officer under whom it had acted. When called upon to prove that Tulane had acted under a federal officer, however, defendants did not confine themselves to Dr. Raub's allegedly supervisory activities but listed every element of participation by any federal employee. The scramble to build a record of federal involvement was necessitated by the fact that IBR, rather than the federal government, was in charge, as discussed above, so that Tulane's prospects of establishing that it had "acted under" a federal officer were questionable at

best. Faced with the daunting task of satisfying the "acting under" requirement, defendants yielded their pretense of having a supervisory federal officer to their concern for demonstrating a stronger federal presence. To this end, Tulane pointed to the roles of Dr. Mishkin in the design of the fatal experiments on the monkeys, and of Dr. Pons, Mishkin's subordinate, in the conduct of the experiments. Petitioners discovered that Dr. Mishkin, a colleague of the criminally-prosecuted IBR experimenter, Dr. Taub, had designed the experiment with others at his home, over a weekend, for the express purpose of avoiding reliance on federal funds. Equally significant was the undisputed fact that Drs. Pons and Mishkin were employees of the National Institute for Mental Health ("NIMH"), now a branch of NIH but then a separate agency; their work on the monkeys was reviewed by neither their NIMH supervisor nor by NIH's Dr. Raub. Making an error of fact neither urged by defendants nor committed by the trial court, the Fifth Circuit simply redesignated Drs. Pons and Mishkin as "NIH officials," who were said to have "participated in and directed the euthanasia of the monkeys." (A-3).

By this holding, the Fifth Circuit reached the anomalous result that although an agency does not qualify as a federal officer under the first clause of § 1442(a)(1), the second clause, referring to a "person acting under *him*," not only encompasses an agency, but more amorphously, the whole of the federal government. Such a broadening of the statute conflicts with the holding of this Court in *IPPL*.

CONCLUSION

The application of federal standing requirements to Petitioners' state law claims in this removed action resulted in the dismissal of the suit and the frustration of state policies, despite the questionable presence of any federal interest and without any consideration whatsoever of the federal defense that theoretically warranted removal in the first place. This result conflicts with this Court's prior pronouncements that § 1442(a)(1) is not meant to contract the rights of the parties, and with this Court's specific question, unanswered below, whether Article III standing guidelines can properly be applied to state-law claims over which the federal court exercises pendent jurisdiction.

This Court has never examined the scope of 28 U.S.C. § 1442(a)(1)'s authorization of removal by a "person acting under" a federal officer. This case presents unresolved questions as to who constitutes a "person", what is meant by "acting under", and who or what qualifies as a federal officer. To the extent these issues have been addressed by the lower courts, disagreements have arisen; and the interpretation rendered by the Fifth Circuit in this case is the most expansive yet, allowing a substantial broadening of federal jurisdiction.

These issues warrant this Court's review.

Respectfully submitted,

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APPENDIX

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-3067

INTERNATIONAL PRIMATE PROTECTION LEAGUE, PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS and LOUISIANA IN SUPPORT OF ANIMALS,

Plaintiffs-Appellants,

versus

ADMINISTRATORS OF THE TULANE EDUCATIONS FUND, NATIONAL INSTITUTES OF HEALTH and INSTITUTES FOR BEHAVIOR RESOURCES, INC.,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana
(CA-91-2966 "L" (2))

(Filed May 9, 1994)

Before REAVLEY and JOLLY, Circuit Judges, and PARKER*, District Judge.

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* Chief Judge of the Eastern District of Texas, sitting by designation.

PER CURIAM:**

The facts of this case are adequately set forth in *International Primate Protection League v. Administrators of the Tulane Educ. Fund*, 895 F.2d 1056, 1057-58 (5th Cir. 1990). The Supreme Court reversed our judgment and remanded the case to state court. *International Primate Protection League v. Administrators of Tulane Educ. Fund*, 111 S. Ct. 1700 (1991). Tulane then removed the case to federal court under 28 U.S.C. § 1442(a)(1). The district court determined that removal was proper and dismissed the suit for lack of standing. The International Primate Protection League appeals. We affirm.

I. Removal under § 1442(a)(1)

For Tulane to remove under § 1442(a)(1), it must be (1) a person (2) acting under a federal officer (3) for an act under color of such office. 28 U.S.C. § 1442(a)(1). Tulane, as a corporate entity, is "a person" within the meaning of § 1442 (a)(1). *See Ryan v. Dow Chem. Co.*, 781 F. Supp. 934, 946-47 (E.D.N.Y. 1992); *see e.g., Peterson v. Blue Cross/Blue Shield of Texas*, 508 F.2d 55, 58 (5th Cir.), *cert. denied*, 422 U.S. 1043 (1975); *Texas v. National Bank of Commerce of San Antonio*, 290 F.2d 229, 231 (5th Cir.), *cert. denied*, 368 U.S. 832 (1961).

** Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Next, we must determine whether Tulane was "acting under" a federal officer. While we review the propriety of the removal *de novo*, we review the court's findings of fact relating to the jurisdictional issue for clear error. *See MDPhysicians & Assc. [sic], Inc. v. State Board of Ins.*, 957 F.2d 178, 180-81 & n.2 (5th Cir.), *cert. denied*, 113 S. Ct. 179 (1992); *Williamson v. Tucker*, 645 F.2d 404, 412-17 (5th Cir.), *cert. denied*, 454 U.S. 897 (1981). "Acting under" as used in § 1442 (a)(1) means the federal officer directs or exercises substantial control over the party's actions. *See Camacho v. Authoridad de Telefonos de Pureto [sic] Rico*, 868 F.2d 482, 486 (1st Cir. 1989); *Ryan*, 781 F. Supp. at 947-50; *Noble v. Employers Ins. of Wausau*, 555 F.2d 1257, 1258-59 (5th Cir. 1977); *see e.g., Peterson*, 508 F.2d at 57; *Bank of Commerce*, 290 F.2d at 231.

The National Institute of Health (NIH) and Tulane entered into a letter agreement that specifically sets forth Tulane's duties as an "aide to NIH," and it states that Tulane must obtain NIH's permission before performing any activity other than the custodial care of the monkeys. Further, NIH officials participated in and directed the euthanasia of the monkeys; Tulane provided the facilities and support staff. Based upon the letter agreement and NIH's participation in the euthanasia of the monkeys, we cannot say that the court clearly erred. *See Bank of Commerce*, 290 F.2d at 231 (holding that detailed letter agreement showed that bank was "acting under" a federal officer). Removal was proper under §1442(a)(1).

II. Standing

Appellants argue that because they have standing under state law, they should be accorded standing to pursue their claim in federal court. In the previous appeal, the Supreme Court noted that this was an open question, which was not before the Court. *Primate Protection,* 111 S. Ct. at 1074-75 n.4. The Supreme Court reversed our judgment on a federal *agency's* right to remove under § 1442(a)(1), but left intact our ruling on standing. We are, therefore, bound by our previous holding under the "law of the case" doctrine. *See Falcon v. General Tel. Co.,* 815 F.2d 317, 319-20 (5th Cir. 1987) ("[I]t would not do well for the morale or credibility of the judiciary to have one panel of Circuit Judges second-guessing another panel from the same circuit on the same question of law in the same case."). Appellants lack standing and the district court properly dismissed the suit.

AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

INTERNATIONAL PRIMATE PROTECTION LEAGUE, ET AL	**CIVIL ACTION**
	NO. 91-2966
	SECTION: L(2)
VERSUS	
ADMIN. OF THE TULANE EDUCATIONAL FUND	

JUDGMENT

(Filed Nov. 3, 1992)

The defendants' motion for summary judgment having been granted dismissing the plaintiffs' case; accordingly,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of the defendants and against the plaintiffs dismissing plaintiffs' suit with costs.

New Orleans, Louisiana, this 3rd day of November, 1992.

/s/ Veronica D. Wicker
VERONICA D. WICKER
UNITED STATES DISTRICT JUDGE

MINUTE ENTRY
WICKER, J

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

INTERNATIONAL PRIMATE PROTECTION LEAGUE ET AL	CIVIL ACTION
VERSUS	NO. # 91-2966
ADMIN. OF THE TULANE EDUC. FUND	SECTION "L" (2)
	(Filed Nov. 2, 1992)

The Fifth Circuit has directed this Court to decide whether the Administrators of the Tulane Educational Fund ["Tulane"] satisfied the two requirements of removal under 28 USC §1442(a)(1). *In re Administrators of Tulane Educational Fund*, 954 F. 2d 266, 270 (5th Cir. 1992). Thereafter the defendants filed a Motion for Summary Judgment on the grounds of standing, sovereign immunity, the supremacy doctrine, and the absence of valid causes of action under Louisiana's animal cruelty and tort laws.

After considering the briefs of counsel, the record, and the applicable law, this Court finds that removal by Tulane was proper under 28 USC §1441(a)(1) and that the defendants' motion for summary judgment has merit.

The history of this lawsuit is ably set forth in the two earlier Fifth Circuit decisions. *In re Administrators, supra* and *International Primate Protection League v. Administrators of Tulane Educational Fund*, 895 F. 2d 1056 (5th Cir. 1990).

The removal statute at issue, 28 USC §1442(a)(1), provides in pertinent part:

> A civil action . . . commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> > Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office. . . .

In connection with the issue of Tulane's removal, the court reviewed Tulane's petition for removal, along with the allegations in plaintiff's complaint; the various Declarations of William F. Raub, Phd., ["Raub"] Acting Director of the National Institutes of Health ["NIH"] setting forth the terms of a 1986 agreement with Tulane for care of the monkeys and NIH's custodial, financial and research interest in the monkeys; an affidavit of Peter Gerone, Director of Tulane's Delta Regional Primate Research Center; the June 23, 1986, letter from Raub to John J. Walsh, Chancellor of the Tulane School of Medicine, confirming the agreement for care of the primates; and those portions of Dr. Raub's deposition concerning the 1986 agreement for care of the monkeys at the Delta Primate Center (Raub deposition at pp. 360-367.)

On that basis, the Court finds sufficient facts have now been submitted to establish that Tulane satisfies the two requirements of §1441(a)(1), namely that, at all material times, Tulane was and is a "person acting under" the Director of the NIH, an officer of the United States, and that its acts are "under color of such office." Accordingly,

Tulane's removal under §1441(a)(1) was proper and this Court has jurisdiction over this case and controversy.

Of the several grounds that defendants advanced in their motion for summary judgment, the Court finds the issue of the plaintiffs' lack of standing dispositive.

In *International Primate Protection League v. Administrators of Tulane Educational Fund,* 895 F. 2d 1056 (5th Cir. 1990), the Fifth Circuit found that the plaintiffs lacked Article III standing either to assert an interest to enjoin Tulane from experimenting on or euthanizing the surviving monkeys, or to seek custody of the monkeys. Specifically, the court found that plaintiffs failed to allege an injury sufficient to meet the second prong of the Article III standing requirements.[1] The U. S. Supreme Court reversed *International Primate Protection League, supra,* only on the issue of whether NIH's removal of this matter from state court was proper under 28 USC §1442(a)(1). *International Primate Protection League v. Administrators of Tulane Educational Fund,,* ___ U.S. ___, 111 S. Ct. 1700 (1991). It specifically pointed out at 111 S. Ct. 1705, footnote 4, that its grant of certiorari did not extend to the

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[1] The Fifth Circuit explained that the plaintiff must demonstrate two things to meet the standing requirements under Article III.

> First "that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant[;]," . . . and second, a causal connection between the injury and the conduct such that the injury is "likely to be redressed by a favorable decision." (Citations omitted.) *International Primate Protection League v. Administrators of Tulane Educational Fund,* 895 F. 2d 1056, 1058 (5th Cir. 1990).

Fifth Circuit's decision that petitioners lacked standing to protect the monkeys.

In bringing this motion to dismiss, the defendants contend that the Fifth Circuit decision on the plaintiffs' lack of standing to sue applies through the doctrine of collateral estoppel. See generally *Greenhouse Patio Apartments v. Aetna Life Ins. Co.*, 868 F. 2d 153 (5th Cir. 1989); *Witherspoon v. United States*, 838 F. 2d 803 (5th Cir. 1988); *Estevez v. Nabers*, 219 F. 2d 321 (5th Cir. 1955). In *Estevez, supra*, the first judgment was dismissed for lack of jurisdiction and the Fifth Circuit commented:

> Even if regarded as a decision not on the merits, the first action precludes a new adjudication of the question actually decided although it does not "bar the cause of action." . . . The Restatement calls this effect of a non-merits judgment 'direct estoppel.' Restatement Judgments Sec. 49, Comment b. This terminological distinction seems valuable to show that such a judgment does not bar the cause of action. But whether the first decision was on the merits or not is not important here, since we regard the two actions as not materially different, and the question actually decided in the first action disposes of the present one as well. *Id.*

In opposing this motion, the plaintiffs argue that they have standing under Louisiana state law, that the Fifth Circuit decision on Article III standing has been vacated and is not binding on this Court, and that there is no federal interest presented in this controversy so the case should again be remanded.

"Standing to sue in any Article III court is . . . a federal question which does not depend on the party's

prior standing in state court. (Citations omitted.)" *Phillips Petroleum Co. v. Shutts*, 472 U. S. 797, 804, 105 S. Ct. 2965, 2970 (1985).

> [T]he irreducible constitutional minimum of standing contains three elements: First, the plaintiff must have suffered an "injury in fact" – an invasion of a legally-protected interest which is (a) concrete and particularized, . . . and (b) "actual or imminent, not 'conjectural' or 'hypothetical,' ". . . . Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court. . . . Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." (Citations omitted.) *Lujan v. Defenders of Wildlife*, ___ U.S. ___, 112 S. Ct. 2130, 2139 (1992)

Although there may no longer be an extant Fifth Circuit decision on standing in this case, the Court cannot ignore the fact that the Fifth Circuit has already decided in this very case that there was a federal interest presented and that these plaintiffs do not meet the constitutional requirements for standing to act as advocates for the monkeys' interest. The depositions and exhibits amassed since the appellate decisions flesh out the details of this controversy but do not alter the conclusion that these privately owned monkeys have been in federal custody for over ten years and that the NIH and its officers have a continuing custodial, financial and research interest in these monkeys. Likewise, the facts presented by the plaintiffs as to standing have not changed since the Fifth

Circuit handed down *International Primates, supra,* and this Court has been presented with no reason why the Fifth Circuit would now reach a different conclusion upon those same allegations and those same facts.

Accordingly, defendants' motion for summary judgment, seeking to dismiss the above captioned case on the ground that plaintiffs lack standing under Article III of the United States Constitution to maintain this suit, IS GRANTED.

The plaintiffs' contention that the Fifth Circuit decision on the plaintiffs' Article III standing was erroneous under such cases as *Japan Whaling Asso. v. American Cetacean Soc.,* 478 U. S. 221, 106 S. Ct. 2860 (1986), *Animal Welfare Institute v. Kreps,* 561 F. 2d 1002 (D. C. Cir. 1977), and *Alaska Fish & Wildlife Federation v. Dunkle,* 829 F 2d 933 (9th Cir. 1987) is more properly addressed to the Fifth Circuit, not to the district court.

The Court having granted the defendants' motion to dismiss, the plaintiffs' Appeal from the Magistrate's Order of September 4, 1992, and their motion to continue trial are now MOOT.[2]

---

[2] In their motion to continue trial of CA #91-2966, the plaintiffs contend that there are several other outstanding motions, namely a motion of Secretary of HHS and Director of NIH to be joined as defendants, an earlier motion of Tulane to dismiss or for summary judgment, plaintiffs' motion to amend the complaint, defendants' motion to join federal officers as defendants, and plaintiffs' motion to remand.

Court records indicate that this Court denied Tulane's earlier motion to dismiss or for summary judgment in October, 1991, and granted the plaintiffs' motion to remand in November

New Orleans, Louisiana, this 30 day of October, 1992.

/s/ Veronica D. Wicker
VERONICA D. WICKER
UNITED STATES DISTRICT JUDGE

1991 and no other motion to remand has been filed. The Court notes further that the plaintiff's motion to amend petition and Tulane's motion to join Sullivan were filed in #91-CV-1966 prior to the Court's granting the plaintiffs' motion to remand and have not been reurged since the case was reopened. Also the court records indicate that the motion of the Secretary of HHS to be joined as defendants was filed in the earlier closed proceeding #CA 88-5713 and was not reurged in CA #91-2966. However, even assuming *arguendo* that they were properly before this Court in this proceeding, this Court's dismissal of the plaintiffs' complaint for lack of standing also makes those motions moot.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-3067

INTERNATIONAL PRIMATE PROTECTION LEAGUE, PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, and LOUISIANA IN SUPPORT OF ANIMALS,

Plaintiffs-Appellants,

versus

ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND, NATIONAL INSTITUTES OF HEALTH, and INSTITUTES FOR BEHAVIOR RESOURCES, INC.,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

---

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion May 9, 1994, 5 Cir., ___, ___ F.3d ___)

(Filed June 9, 1994)

Before REAVLEY, JOLLY, Circuit Judges, and PARKER, District Judge.*

---

*Chief Judge of the Eastern District of Texas, sitting by designation.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Norman M. Reavley
United States Circuit Judge

Judge Duhé did not participate in the consideration of the suggestion for rehearing en banc.

Supreme Court, U.S.
FILED
OCT 31 1994
OFFICE OF THE CLERK

No. 94-381

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

INTERNATIONAL PRIMATE PROTECTION LEAGUE AND ITS MEMBERS, *et al.*,
Petitioners,

v.

ADMINISTRATORS OF TULANE EDUCATIONAL FUND, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENTS ADMINISTRATORS OF TULANE EDUCATIONAL FUND AND INSTITUTES FOR BEHAVIOR RESOURCES, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Should this Court review the decision below to announce a new rule never articulated by any court that plaintiffs in cases removed to federal court pursuant to 28 U.S.C. § 1442(a)(1) do not have to satisfy Article III standing requirements?

2. Should this Court review the trial court's factual finding that Tulane was "a person acting under an officer of the United States" and that its acts were "under color of such office" when that finding was reviewed and approved by a Court of Appeals?

LIST OF PARTIES

Respondent Institutes for Behavior Resources, Inc. ("IBR"), formerly Institute for Behavioral Research, Inc., accepts petitioners' listing of the parties and notes that it is a not-for-profit District of Columbia corporation. IBR has no parents, subsidiaries or affiliates.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-381

INTERNATIONAL PRIMATE PROTECTION LEAGUE AND ITS MEMBERS, *et al.*,
Petitioners,

v.

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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR RESPONDENTS ADMINISTRATORS OF TULANE EDUCATIONAL FUND AND INSTITUTES FOR BEHAVIOR RESOURCES, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents, Administrators of Tulane Educational Fund ("Tulane") and Institutes for Behavior Resources, Inc. ("IBR"), respectfully request that the petition for writ of certiorari be denied.

CONSTITUTIONAL PROVISION INVOLVED

Article III, Section 2. The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers

and Consuls;—to all Cases of admiralty and maritime jurisdiction;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Land under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

COUNTER STATEMENT OF THE CASE

A. Background

In 1981, Dr. Edward Taub, the chief of the Behavioral Biology Center of what is now called the Institutes for Behavior Resources, Inc. ("IBR"), was studying the capacity of monkeys to learn to use a limb after sensory nerves had been severed. Funded by the National Institutes of Health ("NIH"), the project amplified Dr. Taub's earlier research in this area and succeeded in discovering significant benefits for the rehabilitation of human patients suffering from serious neurological injury, such as stroke.

Plaintiff, Alex Pacheco, then an undergraduate student, who, unknown to Dr. Taub, had founded People for the Ethical Treatment of Animals ("PETA"), falsely claimed to be interested in a laboratory science career and offered to work as a volunteer for Dr. Taub at the IBR animal laboratory facility in Silver Spring, Maryland. Dr. Taub permitted Pacheco to work as a volunteer, and Pacheco came regularly to the laboratory during the summer of 1981. Pacheco caused the Montgomery County Police Department to charge Dr. Taub with animal cruelty under Section 59 of the Maryland Code.

The police obtained a search warrant from the Circuit Court for Montgomery County and on September 11, 1981, seized IBR's 17 monkeys used in Dr. Taub's experiments. Pursuant to court order the monkeys were returned to IBR. Subsequently, 17 criminal charges were filed against Dr. Taub alleging 119 violations of the Maryland animal cruelty statute.

On October 9, 1981, the Circuit Court for Montgomery County, without opposition from IBR, the owner of the monkeys, directed the monkeys' transfer to an NIH facility in Poolesville, Maryland. The order was to remain in effect "until further Order of this Court or the termination of the pending criminal prosecution against Dr. Taub, whichever occurs first".

Dr. Taub stood trial in November 1981 in the District Court for Montgomery County. After a bench trial, the court entered orders of conviction for failure to provide "necessary veterinary care" for six monkeys and acquitted Dr. Taub of the other 113 charges.

Fearing that the court order on custody of the monkeys would expire with an acquittal, PETA sought to prevent the return of any animals to IBR. The International Primate Protection League ("Primate League"), PETA and others filed a bill of complaint on December 3, 1981, in the Circuit Court of Montgomery County in which they purported to speak for "their own and class interests and as the next friends of seventeen (17) non-human primates". PETA alleged that a civil inquiry would demonstrate that IBR had violated the federal Animal Welfare Act, 7 U.S.C. § 2131 *et seq.* PETA asked the court to designate it and the other plaintiffs as guardians of the monkeys, and to preclude IBR from regaining possession of them. *International Primate Protection League v. Institute for Behavioral Research, Inc.*, 799 F.2d at 934, 936 (4th Cir. 1986), *cert. denied*, 481 U.S. 1004 (1987).

On the basis of the federal question presented, NIH removed the case to the U.S. District Court for the District of Maryland pursuant to 28 U.S.C. § 1441(b).

Dr. Taub appealed his six state court convictions to the Circuit Court for Montgomery County, Maryland, where a jury, after a "trial de novo," returned a guilty verdict against Taub on one count (failure to provide necessary veterinary care to one monkey). The Court of Appeals

of Maryland granted a writ of certiorari and reversed the conviction, holding that Article 27, Section 59 of the Maryland Code did not apply to IBR, an institution conducting medical research pursuant to a federal program. *Taub* v. *State*, 296 Md. 439, 463 A.2d 819 (1983).

After Dr. Taub was acquitted of all criminal charges, NIH continued to act as custodian of the monkeys with the consent of their owner, IBR.

B. The Appeal to the Fourth Circuit

In 1985, on motion of IBR, the Maryland federal district court dismissed the case for lack of standing on the part of the plaintiffs.

PETA (and the other plaintiffs) appealed the dismissal of their case to the Fourth Circuit. (While the appeal was pending, NIH transferred the remaining 15 monkeys to the Delta Regional Primate Research Center in Covington, Louisiana. Five of the monkeys, which had not been surgically altered, were later transferred to the San Diego Zoo. For the care of the surgically altered animals, and one control animal, NIH entered into a contract with Tulane University through its School of Medicine ("Tulane"), which operates the Delta Center. Under the contract, the Delta Center assists NIH in its role as custodian of the monkeys.)

In 1986, the Fourth Circuit affirmed the district court's dismissal of the complaint, stating in part:

> In this case we must decide whether a group of private individuals may challenge a medical researcher's compliance with federal standards for the care of laboratory animals. *Because we find that the plaintiffs lack standing to bring such a lawsuit, we affirm* the judgment of the district court in its dismissal of this action.
>
> To imply a cause of action in these plaintiffs might entail serious consequences. It might open the use of

> animals in biomedical research to the hazards and vicissitudes of courtroom litigation. It may draw judges into the supervision and regulation of laboratory research. It might unleash a spate of private lawsuits that would impede advances made by medical science in the alleviation of human suffering. To risk consequences of this magnitude in the absence of clear direction from the Congress would be ill-advised. ***In fact, we are persuaded that Congress intended that the independence of medical research be respected and that the administrative enforcement govern the Animal Welfare Act.*** 799 F.2d at 935 (emphasis added).

PETA's petition to the Supreme Court of the United States for a writ of certiorari was denied in 1987. 481 U.S. 1004 (1987).

C. Prior Proceedings in Louisiana

In 1988, based on the recommendation of a panel of independent experts in veterinary care, primate behavior, and neurology, NIH determined that three of the monkeys should be euthanized because of the amount of distress they were experiencing. Plans were made to euthanize them humanely on December 28-31, 1988. In furtherance of its statutory research mission, NIH hoped to gain, through the autopsy of the animals, knowledge that might lead to improvements in rehabilitation therapy for individuals who have suffered brain or spinal cord damage. *See International Primate Protection League* v. *Tulane Educational Fund*, 895 F.2d 1056, 1058 (5th Cir. 1990).

To preclude the euthanasia and experimentation, on December 28, 1988, PETA, Primate League and others filed suit in the Civil District Court for the Parish of Orleans in the State of Louisiana, again seeking custody of all the surviving Silver Spring Monkeys, and injunctive relief against the named defendants, the Administrators of the Tulane Educational Fund, the National Institutes of Health, and the Institutes for Behavior Resources, Inc.

The Louisiana state court issued a temporary restraining order against Tulane, the only party then served.

The United States Attorney on behalf of NIH removed the case, under the authority of 28 U.S.C. § 1442(a)(1), to the United States District Court for the Eastern District of Louisiana. After the removal, petitioners moved for and secured a temporary restraining order.

The Court of Appeals for the Fifth Circuit concluded that the removal was proper, the federal interest was adequately established, and that petitioners did not meet the standing requirement of Article III. Accordingly, the Fifth Circuit vacated the district court order and dismissed the entire case. *IPPL* at 1058-61 (1990).

After a motion by plaintiffs to Stay the Mandate was denied, on July 6, 1990, NIH performed the euthanasia and the experimental protocol on the three monkeys. Earlier, another monkey had been euthanized and two had died.

On November 26, 1990, this Court granted Plaintiffs' Petition for a Writ of Certiorari. However, review was limited to the first question presented; namely, the propriety of the removal of the case by NIH from the state court to the federal court.

In January 1991, the health of two of the monkeys, Titus and Allen, deteriorated. As a result, NIH decided to euthanize the two animals.

This decision by NIH was based both on a concern for the monkeys' welfare and the significance of the experimental protocol. The monkeys had great scientific value because of the long period of time they had spent in a deafferented state and the comparatively large portions of their bodies that had been deafferented. NIH expected that the experimentation following euthanasia would significantly aid efforts to promote recovery in persons with neurological damage. However, that data would be irretrievably lost if the monkeys expired before

the euthanasia could begin, or if they did not remain stable enough to undergo the experimental process. NIH advised counsel for plaintiffs of its decision and the reasons for it on April 8, 1991.

D. Proceedings in the Supreme Court

On April 8, 1991, plaintiffs, in an effort to preclude any experiments on the monkeys, moved the district court for a "restoration of [its] injunction". The district court denied plaintiffs' motion.

On the same day, April 10, plaintiffs sought the same relief they had sought in the district court, in the Fifth Circuit and in the Supreme Court of the United States. On the evening of April 10, 1990, Justice Kennedy entered an order directing the recall of the Fifth Circuit's mandate, enjoining NIH and Tulane from performing the planned euthanasia and directing the Solicitor General to file a response.

After receiving briefs in opposition from NIH and IBR, this Court denied plaintiffs' motion on April 12, 1991. The euthanasia and terminal experiments on the two primates were completed promptly thereafter.

Data obtained from these experiments were published in prestigious scientific journals. *See, e.g.*, Pons, *Massive Cortical Reorganization After Sensory Deafferentation in Adult Macaques, Science* (vol. 252, pp. 1851-56 (1991)).

On May 20, 1991, the Supreme Court held that the removal by NIH from state court to federal court was improper and directed a remand to the Civil District Court for the Parish of Orleans, Louisiana. In Footnote 4 of its opinion, the Supreme Court stated in part:

> Our grant of certiorari did not extend to the Court of Appeals' determination that petitioners lacked standing to protect the monkeys. We therefore leave open the question whether a federal court in a § 1442(a)(1) removal case may require plaintiffs to

> meet Article III's standing requirements with respect to the state-law claims over which the federal court exercises pendent jurisdiction.

International Primate Protection League v. *Administrators of Tulane Educational Fund*, 500 U.S. 72, 111 S. Ct. 1700, 1705 n.4 (1991).

The Court also stated:

> "(W)hether Tulane will be able to remove the remanded case requires a determination whether it is a 'person acting under' the Director of N.I.H. within the meaning of 1442(a)(1). This mixed question of law and fact should not be resolved in the first instance by this Court, least of all without an appropriate record". *Id.* at 1710.

E. Proceedings After the Supreme Court Decision

After the remand to state court, Tulane removed the action to the federal district court under § 1442(a)(1) as a "person acting under" an officer of the United States. The district court granted a motion by the plaintiffs to remand the case to state court, whereupon Tulane filed a petition for a Writ of Mandamus with the Fifth Circuit seeking to reverse the district court's remand order.

The Court of Appeals concluded that the district court did not base its remand on jurisdictional grounds and that, accordingly, the Court of Appeals had jurisdiction to review the remand order.

In vacating the remand order, the Fifth Circuit in the mandamus action stated in part:

> "That the Supreme Court declined to speculate on whether Tulane is a 'person acting under' the Director of NIH within the meaning of § 1442(a)(1) on the record before it, does not mean that the district court may remand these issues to the state court. Although it is not perfectly clear to us that *any* interpretation of state law is necessary, even if it is,

> a district court does not enjoy the luxury of remanding a case to a state court to interpret state laws or to make a record. The district court must decide for itself whether Tulane satisfied the two requirements of § 1442(a)(1), *i.e.*, that Tulane is a 'person acting under' an officer of the United States and that its acts are 'under color of such office'. *See* James Wm. Moore and Brett A. Ringle, 1A Moore's Federal Practice ¶ 0.164[2] at 398 (Matthew Bender, 1991). (emphasis supplied).
>
> We conclude that the district court expressly and affirmatively based its decision to remand on non-§ 1447(c) grounds. We therefore have jurisdiction to review the remand order under the Thermtron exception to § 1447(d). We conclude that the petition has merit. Accordingly, we GRANT the petition for mandamus and VACATE the remand order."

After the remand order was vacated the parties engaged in extensive discovery, both on the merits and on the jurisdictional issues. Depositions were taken, documents produced, interrogatories were propounded and answered.

Defendants then moved for summary judgment. The district court in its decision granting the motion referred to parts of the record it reviewed. *See* Pet. App. A-7. The Court concluded:

> "On that basis, the Court finds sufficient facts have now been submitted to establish that Tulane satisfies the two requirements of [1442](a)(1), namely that, at all material times, Tulane was and is a 'person acting under' the Director of the NIH, an officer of the United States, and that its acts are 'under color of such office'. Accordingly, Tulane's removal under [1442](a)(1) was proper and this Court has jurisdiction over this case and controversy".

The Court of Appeals agreed that Tulane, a corporate entity, was a "person" within the meaning of § 1442 (a)(1). Pet. App. A-2.

In reviewing the trial court's determination that Tulane was "acting under" a federal officer, the Court of Appeals reviewed the trial court's "findings of fact relating to the jurisdictional issues for clear error". *Id.* at A-3. The standard of review issue was the subject of supplementary post oral argument briefing. *See* Respondents' App. A-1.

Relying in part on the letter agreement between Tulane and NIH, and the central role of NIH officials, the Fifth Circuit concluded that it could not say that the trial court "clearly erred". Pet. App. A-3.

REASONS FOR DENYING THE WRIT

I. PETITIONERS, WITHOUT ANY LEGAL BASIS, CONTEND THAT AS PLAINTIFFS THEY DO NOT HAVE TO ESTABLISH THEIR OWN ARTICLE III FEDERAL COURT STANDING BECAUSE, PRIOR TO THE REMOVAL BY TULANE, THEY ASSERTED EXCLUSIVELY STATE LAW CAUSES OF ACTION IN STATE COURT. ARTICLE III STANDING REQUIREMENTS, THEY INCORRECTLY CONTEND, ARE SATISFIED BY THE ASSERTION OF A FEDERAL DEFENSE IN THE REMOVAL PETITION FILED BY TULANE IN ACCORDANCE WITH 28 U.S.C. § 1442(a)(1).

1. This is a different argument than the one Petitioners made to the district court where they asserted that "plaintiffs can satisfy the standing requirements of either state or federal court". Memorandum in Opposition to Defendants' Motion for Summary Judgment, at 72 (Oct. 21, 1992). Plaintiffs below also contended that the first Fifth Circuit decision was erroneous in concluding that plaintiffs had not established federal court standing. Pet. App. 11.

2. The argument, upon which Petitioners relied in the Court of Appeals—that as plaintiffs asserting exclusively state law causes of action their lack of federal court standing is irrelevant—ignores the purpose of Article III, which

requires that parties seeking affirmative relief must always establish their federal court standing.

As stated in Stern and Gressman, *Supreme Court Practice,* 707 (6th ed.), to satisfy Article III a plaintiff must establish: 1) that he personally suffered some actual or threatened injury, 2) that the injury can be traced to the action of the defendant, and 3) that the injury can be redressed by a favorable decision.

Stern and Gressman also summarize the "prudential considerations" supplementing the Article III standing requirements "directed toward avoiding unnecessary and inappropriate constitutional adjudications". *Id.* at 708. They point out that "in state court cases, the Court is not bound by the state law of standing * * * for the Article III concerns are particularly federal in nature". *Idem.* Stern and Gressman also cite *Waller* v. *Georgia*, 467 U.S. 39, 43 n.3 (1984) for the proposition that "state court standing determination is not controlling as to the Supreme Court's duty to avoid advisory opinions". Stern and Gressman, *id.* at 709. These constitutional and prudential considerations are, or course, equally applicable to United States District Courts and Courts of Appeal.

The Constitution of the United States in Article III thus confines the federal judiciary to deciding "cases and controversies". If a plaintiff were not required to establish his own standing, there would be no means to insure that the "case or controversy" requirement is satisfied. The removal by the federal officer, or person acting under him, though providing federal question jurisdiction, does not speak to the standing issue.

3. Were Petitioners' novel and unsupported constitutional interpretation accepted, i.e., that plaintiffs in cases filed in state court under state law and removed to federal court pursuant to § 1442(a)(1) by virtue of federal officer involvement or direction need not establish

federal court standing, the jurisdiction and case load of the federal courts would be radically expanded.

If Petitioners' approach were implemented, any law school student in the United States could file suit in state court against a federal government officer, attacking under state law federal government policies he found objectionable. The removal petition and the officer's assertion of a federal defense would, in Petitioners' view, satisfy Article III—even if the law student had no personal stake in the litigation. In such circumstances, though the federal court would have jurisdiction to hear the federal defense, the "case or controversy" requirement of Article III would not have been satisfied. Without a direct personal stake on the part of the hypothetical law school student plaintiff, there would not be a "case or controversy" because the law student lacked standing to challenge government policy.

Petitioners advocate a pernicious doctrine of constitutional interpretation which could cause great mischief in federal courts.

4. An additional weakness in Petitioners' novel theory is that "the removal statute merely serves to overcome the 'well-pleaded complaint' rule which would otherwise preclude removal even if a federal defense were alleged". *Mesa* v. *California,* 489 U.S. 121, 136 (1989). Federal officer removal cases are, nevertheless, cases arising under "the laws of the United States" for Article III purposes. Are Petitioners by implication contending that federal question removals under 28 U.S.C. § 1441(b) can go forward even if the plaintiff lacks Article III standing?

In a federal-question removal, the federal issue must appear on the face of a well-pleaded complaint. In federal-officer removals, the federal issue is asserted defensively in the removal petition. However, either form of federal question case can call into question important federal government programs. On what conceivable basis

should the standing requirement apply only when the federal question is asserted offensively, but be waived in cases when it is asserted defensively? Petitioners might just as well assert that in all federal-question litigation the presence of the federal issue, however asserted, satisfies Article III—even in the absence of a plaintiff with a personal stake in the litigation sufficient to create a case or controversy.[1]

Nor would it make sense for a federal court to hear state law claims in the absence of a plaintiff with Article III standing in *federal-officer* removal case (as Petitioners advocate), when such pendent state law claims cannot, in

---

[1] The federal officer removal statute is not the only instance in which the federal basis for removal need not appear on the face of the complaint but can be established in the removal petition. For example, chapter 2 of the Federal Arbitration Act, 9 U.S.C. § 201-08 (1982 ed.), provides in section 205:

> Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. *The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal.* For the purposes of Chapter 1 of this title any action or proceeding removed under this section shall be deemed to have been brought in the district court to which it is removed. (Emphasis supplied.)

Were Petitioners' arguments to be accepted the removal petition itself would establish Article III standing requirements even if the state court plaintiff lacked any economic interest in the international contract containing the arbitration clause. If this is not the implication of Petitioners' argument, on what conceivable basis should standing requirements be different for cases removed from state court to federal court under 28 U.S.C. § 1442(a)(1) rather than 9 U.S.C. § 205? Clearly, in both instances the removal to federal court does not establish that there is a case or controversy.

the absence of standing, be heard in *federal-question* removal cases.

In 1981, Petitioners (PETA and International Primate Protection League) sued Respondents (National Institutes of Health and Institutes for Behavior Resources) in a Maryland state court, asserting claims under the federal Animal Welfare Act with respect to the same Silver Spring Monkeys at issue in this case. As plaintiffs therein they also asserted pendent state law causes of action. The case was removed to federal district court on the basis of federal-question jurisdiction. A motion to dismiss for lack of standing was granted. The Court of Appeals for the Fourth Circuit upheld the dismissal of the federal claims because the plaintiffs lacked standing. *International Primate Protection League* v. *Institute for Behavioral Research, Inc.*, 799 F.2d 934 (4th Cir. 1986), *cert. denied*, 481 U.S. 1004 (1987).

The Fourth Circuit also dismissed the pendent state law claims, holding that "without a justiciable case or controversy, federal courts cannot address claims of state law". *Id.* at 941.

It would indeed be anomalous if essentially the same state law claims in federal-question cases were to have different standing requirements, depending on whether the removal was based on a *federal question* (as in the Fourth Circuit case), or removal on the basis of *federal officer* involvement, as in this case. Yet this is the result Petitioners advocate.

5. Petitioners seek to impart an aura of respectability to their argument by suggesting that there is treatise and case law support for their theories. At pages 11-12 of the Petition, they state:

> "For this reason, Wright, et al. have opined that where questions of state law are presented to federal courts, state standing law applies. 13A *Federal Practice and Procedure: Jurisdiction* 2d § 3531.14 at 84.

> See also, *Ferency* v. *Austin*, 493 F. Supp. 683, 690 (W.D. Mich. 1980)".

Neither of the two cited authorities remotely supports Petitioners' contention that the plaintiffs' lack of standing can be ignored in federal officer removal cases.

Wright and Miller state in 13A *Federal Practice and Procedure*: *Jurisdiction* 2d § 3531.14 that "standing in federal court is a matter of federal law". They also state in the same section:

> "Of course, state rules that recognize standing need not be honored if Article III requirements are not met". p. 91.

Nowhere do Wright and Miller say or suggest that, in federal officer removal cases, the plaintiff does not have to establish Article III standing.

Nor does the district court case of *Ferency* v. *Austin*, 493 F. Supp. 683, 690 (W.D. Mich. 1980) support Petitioners' assertions.

Ferency was not a federal officer removal case under 28 U.S.C. § 1442(a)(1). It was a run-of-the-mill federal question removal under 28 U.S.C. 1441(b). The case was an attack on the State of Michigan's election law as applied to the Democratic party. Violations of the United States Constitution were alleged in the complaint and the defendant removed on that basis.

The defendant argued that Ferency did not have state court standing under the Michigan APA. This was a critical issue because if the state court lacked jurisdiction, which it would if Ferency lacked state court standing, the federal court could not acquire jurisdiction by virtue of the removal, even if it would have had original jurisdiction of such an action. Wright and Miller, *Federal Practice and Procedure*, Removal from State Courts, § 3722.

There is not the slightest suggestion that if Ferency had state court standing, he would not also be required to establish federal court Article III standing. Such a standing requirement was assumed, but not even discussed in this opinion.

Nor does the case of *Asarco, Inc.* v. *Kadish,* 490 U.S. 605 (1988) advance Petitioners' argument. Though the state court plaintiffs lacked federal court standing, a case or controversy developed in the process of state court adjudication. Thus the original defendants acquired standing to invoke the jurisdiction of the Supreme Court. There is no suggestion in *Asarco* that federal court standing requirements can be waived for select classes of claimants. Indeed the *Asarco* court stated,

> "We determined that the Petitioners have standing to invoke the authority of a federal court and that this dispute now presents a justiciable case or controversy for resolution here. * * * We also conclude that the record shows the existence of a genuine case or controversy essential to invoke exercise of the jurisdiction of this court." *Id.* at 618-19.

6. Petitioners' argument that "the imposition of Article III requirements on state law claims" is improper, and serves no federal purpose, suggests that the import of their argument is that federal court standing should not even be required of plaintiffs in diversity cases, either filed in a district court pursuant to 28 U.S.C. § 1332 or removed to a federal court pursuant to 28 U.S.C. § 1441(a).

Since *Erie Railway Co.* v. *Tomkins,* 304 U.S. 64, 68 (1938), in diversity cases "the law to be applied in any case is the law of the state". Though a federal forum is provided to diverse litigants as it is to federal question litigants, that does not mean that federal constitutional principles are superseded. As the *Erie* court noted, the application of state law applies "except in matters gov-

erned by the Federal Constitution or by Acts of Congress". *Idem.*

It is clear, however, that federal court diversity litigants must satisfy federal court standing requirements if they are to assert their state law causes of action in federal court. There is no apparent reason to require federal court standing for diverse litigants asserting causes of action under state law, whose actions are removed to federal court by reason of diversity jurisdiction, but to waive that standing requirement for state court litigants similarly asserting state law causes of action, whose cases are removed to federal court by federal officers, or those acting under them, because of the existence of a federal defense.

There is no reason for this Court to review the decision below to establish a hitherto unknown exception to federal court standing requirements—either limited to federal-officer removal cases, or more expansive. This is the identical complaint that was previously before this Court when the standing issue was not deemed suitable for review. Though in Footnote 4 of its 1991 opinion this Court left open the question of whether in federal-officer removal cases plaintiffs may be required to meet federal court standing requirements with respect to their state law claims, that issue was neither decided nor considered in depth. No court has ever held that there is an exception to the federal standing requirement in federal-officer removal cases. In the absence of a single authority supporting Petitioners, there is no reason to dignify Petitioners' contentions by granting review of the decision below.

II. THE "LAW OF THE CASE" RULE WAS PROPERLY APPLIED.

This Court in *IPPL*, 111 S. Ct. at 1710, reversed but did not vacate the first Fifth Circuit opinion; this Court directed a remand to state court. Certiorari had not been granted on the standing issue. *Id.* at 1705 n.4.

When after the remand to state court, and Tulane's removal to federal court, the district court judge properly concluded that, were the Fifth Circuit to review the identical complaint for the second time, there was no reason to believe that the Court would rule differently on the standing issue. Pet. App. A 10-11. Inasmuch as the removal under 28 U.S.C. § 1442(a)(1) by Tulane had been upheld, plaintiffs' lack of federal court standing required dismissal, not a remand. *Cf. Maine Assn. of Independent Neighborhoods* v. *Commissioner*, 876 F.2d 1055 (1st Cir. 1989). The district court judge accordingly granted summary judgment dismissing the case. Pet. App. 11.

The Court of Appeals under *Falcon* v. *General Tel. Co.*, 815 F.2d 317, 319-20 (5th Cir. 1987), followed the previous panel's ruling on the standing issue. As *Falcon* notes, the law of the case doctrine "is not an inexorable command by a rule of practice limited in scope" and with a number of exceptions. *Id.* at 320. If any of the exceptions had been applicable, the panel would have been free to reexamine the standing issue; though, if they had, there is no reason to believe that they would have decided differently. In any event, the invocation of the "law of the case" rule, to follow a previous panel's decision on standing with respect to the identical petition and parties, was proper. Indeed, there was no reason for the Court to revisit the issue of whether or not Petitioners had federal court standing because Petitioners were no longer contending that they had standing, but rather that they did not need standing at all. The latter argument was not accepted.

III. THE COURT OF APPEALS PROPERLY APPLIED THE "CLEAR ERROR" STANDARD IN REVIEWING THE TRIAL COURT'S FACTUAL DETERMINATION THAT TULANE WAS "ACTING UNDER" A FEDERAL OFFICER, AND THUS ENTITLED TO REMOVE THE CASE TO FEDERAL COURT.

When this case was last before this Court, the removal issue was considered but not resolved. As noted above, this Court stated:

> "(W)hether Tulane will be able to remove the remanded case requires a determination whether it is a 'person acting under' the Director of N.I.H. within the meaning of 1442(a)(1). This mixed question of law and fact should not be resolved in the first instance by this Court, least of all without an appropriate record." *IPPL*, 111 S. Ct. at 1711.

Following the remand to state court, Tulane, as contemplated, removed the case to federal court.

Thereafter, as previously noted, the parties engaged in extensive discovery, both on the merits and the jurisdictional issues. Depositions were taken, documents produced, and interrogatories propounded and answered.

Discovery came to a halt when the principals of Petitioner PETA refused to answer discovery deposition questions, on the ground that they might incriminate themselves with respect to their association with a known terrorist organization. They asserted that various federal grand juries were looking into possible RICO violations on their part.

Fortunately, a sufficient record had at that point been developed to permit the defendants to move for summary judgment on the standing issue, and to flesh out the factual basis for the Tulane removal petition.

The district court in its decision referred to portions of the record it reviewed. Pet. App. A-7. The Court concluded:

> "On that basis, the Court finds sufficient facts have now been submitted to establish that Tulane satisfies the two requirements of [1442](a)(1), namely that, at all material times, Tulane was and is a 'person acting under' the Director of the NIH, an officer of the United States, and that its acts are 'under color of such office'. Accordingly, Tulane's removal under [1442](a)(1) was proper and this Court has jurisdiction over this case and controversy".

The Court of Appeals agreed that Tulane, a corporate entity, is a "person" within the meaning of § 1442(a)(1). Pet. App. A-2. The result is consistent with, if not compelled by, the Dictionary Act, 1 U.S.C. 1. No court of appeals has ever held that a corporation cannot be a person under 1442(a)(1), and the cases are legion in which corporations have removed cases under 1442(a)(1) as "a person" acting under a government officer. *See, e.g., Peterson* v. *Blue Cross/Blue Shield of Texas,* 508 F.2d 55, 58 (5th Cir. 1974), *cert. denied,* 422 U.S. 1043 (1975). *Texas* v. *National Bank of Commerce of San Antonio,* 290 F.2d 229, 231 (5th Cir. 1961), *cert. denied,* 368 U.S. 832 (1961); *Camacho* v. *Autoridad de Telephonos de Puerto Rico,* 868 F.2d 482, 486 (1st Cir. 1989).

In reviewing the trial court's determination that Tulane was "acting under" a federal officer, the Court of Appeals reviewed the trial court's "findings of fact relating to the jurisdictional issues for clear error". *Id.* at A-3. The standard of review issue was the subject of supplementary post oral argument briefing. *See* Respondents' App. A-1.

Relying in part on the letter agreement between Tulane and NIH, and the central role of NIH officials, the Fifth Circuit concluded that it could not say that the trial court "clearly erred". Pet. App. A-3. Petitioners make a generalized objection to the factual determination by the district court, but none of this comes close to rising to the level of "clear error".

Nor is such a factual determination, approved by two courts, a suitable subject for review by this Court. As stated in Stern and Gressman, *supra,* at 217-18:

> "The Court is even less likely to take a case to review a factual issue—or to reverse on such an issue if certiorari is granted for some other reason—where the findings of fact made by the district court receive the concurrence of the court of appeals. In that situation the Court has often held that 'a court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error'. *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949), and cases cited * * *."

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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October 31, 1994

APPENDIX

APPENDIX

U.S. Department of Justice

[DoJ LOGO]
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Telephone:
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Washington, D.C. 20530

April 14, 1994

Mr. Charles R. Fulbruge III
Clerk
United States Court of Appeals
for the Fifth Circuit
600 Camp Street
New Orleans, LA 70130

Re: International Primate Protection League v. Administrators of the Tulane Educational Fund, No. 93-3067 (5th Cir.)

Dear Mr. Fulbruge:

On April 7, 1994, plaintiffs filed a letter seeking to correct a misstatement by plaintiffs' counsel during oral argument of this case. The alleged misstatement concerned the proper legal standard for reviewing the District Court's finding that Tulane is acting under NIH officials with respect to Tulane's care of the monkeys. *See* Opinion at 2 (the Court "finds sufficient facts have now been submitted to establish that Tulane" is a person acting under the Director of NIH with respect to the monkeys).

Defendants file this response because plaintiffs' letter incorrectly states the applicable law. Although the ultimate conclusion regarding whether a case is removable is a legal issue to be reviewed *de novo, Garrett* v. *Commonwealth Mortgage Corp. of America,* 938 F.2d 591,

593 (5th Cir. 1991), findings of fact that relate to jurisdictional issues are reviewed under the clearly erroneous standard. *See MDPhysicians & Associates, Inc.* v. *State Board of Insurance*, 957 F.2d 178, 180-181 & n.2 (5th Cir.), *cert. denied*, 113 S. Ct. 179 (1992); *Williamson* v. *Tucker*, 645 F.2d 404, 412-417 (5th Cir.), *cert. denied*, 454 U.S. 897 (1981). The only exception to that rule is when jurisdictional issues cannot be separated from the merits of a case. *See Williamson*, 645 F.2d at 416 & n.10. This case does not present that situation. Whether NIH officials have the right to control Tulane's actions regarding the monkeys is not inextricably intertwined with plaintiffs' state law claims or with NIH's Supremacy Clause and sovereign immunity defenses. Therefore, the Court should review the District Court's factual finding that Tulane is acting under NIH officials with respect to the monkeys under the clearly erroneous standard, and it should review all related legal issues, including the ultimate conclusion about whether the case was properly removed, *de novo*.

We would appreciate it if you could distribute this letter to the Judges on the panel in this case (Fifth Circuit Judges Jolly and Reavley and District Judge Parker, sitting by designation) on behalf of all the Defendants-Appellees.

Thank you for your assistance in this regard.

Sincerely,

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Supreme Court, U.S.
FILED
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No. 94-381

In the Supreme Court of the United States

OCTOBER TERM, 1994

INTERNATIONAL PRIMATE PROTECTION LEAGUE, ET AL., PETITIONERS

v.

ADMINISTRATORS OF TULANE EDUCATIONAL FUND, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL INSTITUTES OF HEALTH IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the plaintiff in an action removed under 28 U.S.C. 1442(a)(1) must have Article III standing.

2. Whether respondent Administrators of the Tulane Educational Fund (Tulane) was entitled to remove this action to federal court as a "person acting under" a federal officer within the meaning of 28 U.S.C. 1442(a)(1).

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-381

INTERNATIONAL PRIMATE PROTECTION LEAGUE, ET AL., PETITIONERS

v.

ADMINISTRATORS OF TULANE EDUCATIONAL FUND, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL INSTITUTES OF HEALTH IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is unpublished, but the decision is noted at 22 F.3d 1094 (Table). The opinion of the district court (Pet. App. A5-A12) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 1994. A petition for rehearing was denied on June 9, 1994. Pet. App. A13-A14. The petition for a writ of

certiorari was filed on August 31, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The background of this case is described in the prior opinions of this Court, *International Primate Protection League (IPPL)* v. *Administrators of Tulane Educ. Fund*, 500 U.S. 72 (1991), and the Fifth Circuit, *In re Administrators of the Tulane Educ. Fund*, 954 F.2d 266 (1992); *IPPL* v. *Administrators of the Tulane Educ. Fund*, 895 F.2d 1056 (1990). The case concerns the care and custody of macaque monkeys that were the subject of experiments concerning the ability of the monkeys to recover the use of a limb after sensory nerves in the limb had been "deafferented" (severed). The experiments were first conducted in 1981 by a private research facility, respondent Institutes for Behavior Resources (IBR), under a grant from respondent National Institutes of Health (NIH). The present petition seeks review of the Fifth Circuit's holding that the case was properly removed from state court under 28 U.S.C. 1442(a)(1) by respondent Administrators of the Tulane Educational Fund (Tulane), and properly dismissed because petitioners lack Article III standing. Pet. App. A1-A4.

1. In September 1981, the State of Maryland seized 17 monkeys from IBR's laboratory in Silver Spring and initiated criminal proceedings against Dr. Edward Taub based on alleged mistreatment of the monkeys. NIH took temporary custody of the monkeys under an order of a Maryland state court. *IPPL*, 500 U.S. at 75 n.1. After Dr. Taub was cleared of all state criminal charges, the custody order terminated, but NIH kept custody of the monkeys under an agreement with IBR, the owner of the

monkeys. *Ibid.* That agreement remains in effect. See *ibid.*

In December 1981, several petitioners and other plaintiffs sued IBR, NIH, and other defendants in a Maryland state court. The plaintiffs alleged that the defendants had violated state animal welfare laws and the federal Animal Welfare Act, 7 U.S.C. 2131 *et seq.* See *IPPL* v. *Institute for Behavioral Research, Inc.*, 799 F.2d 934, 937 (4th Cir. 1986), cert. denied, 481 U.S. 1004 (1987). NIH removed the action to federal court under 28 U.S.C. 1441(b), and then IBR moved to dismiss the action on the ground that the plaintiffs lacked Article III standing. 799 F.2d at 937. The district court dismissed the action for lack of standing, and the Fourth Circuit affirmed. *Ibid.*

2. In 1986, while the Fourth Circuit case was pending, NIH sent several of the monkeys to Tulane University's Delta Primate Research Center in Covington, Louisiana. NIH also entered into a contract with Tulane under which Tulane agreed to assist NIH in its role as custodian of the monkeys. *IPPL*, 500 U.S. at 75.

In 1988, NIH announced plans to "euthanize three of the remaining monkeys and, in the process, to complete some of the medical research by performing surgical procedures." 500 U.S. at 76. Petitioners then filed this action in the Civil District Court for the Parish of Orleans, Louisiana. They alleged that respondents' treatment of the monkeys violated Louisiana law. They also sought preliminary and permanent injunctive relief, including an order giving custody of the monkeys to petitioners or certain members of the United States Congress.

Respondent NIH removed the action to the United States District Court for the Eastern District of

Louisiana under 28 U.S.C. 1442(a)(1).[1] See *IPPL*, 500 U.S. at 75. The district court issued a temporary restraining order barring NIH from performing euthanasia and medical research on the three monkeys. *Id.* at 75-76. After the court extended the order beyond the 20-day limit for temporary restraining orders specified in Fed. R. Civ. P. 65(b), NIH appealed the order as a preliminary injunction under 28 U.S.C. 1292(a)(1). See *IPPL*, 500 U.S. at 76.

The Fifth Circuit vacated the preliminary injunction and dismissed the case. It first held that plaintiffs lack Article III standing. 895 F.2d at 1062. It rejected petitioners' contention that they have standing because of their "personal relationships" with the monkeys, their "long-standing, sincere commitment to preventing inhumane treatment of animals," or their asserted role as "[a]dvocates for * * * the monkeys." *Id.* at 1059-1061. The court further held that NIH was entitled to remove the action under 28 U.S.C. 1442(a)(1), because that provision authorizes removal by federal agencies. 895 F.2d at 1061-1062.

This Court granted certiorari to review the Fifth Circuit's holding on the removal issue, but the Court

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[1] 28 U.S.C. 1442(a)(1) provides:

> A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> > (1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

declined to grant certiorari to review the Fifth Circuit's holding on the standing issue. 498 U.S. 980 (1990). The Court subsequently reversed the Fifth Circuit's judgment, holding that, while a federal *officer* may remove a case under 28 U.S.C. 1442(a)(1), a federal *agency* may not. 500 U.S. at 88-89. In light of its conclusion that NIH was not entitled to remove the action, the Court ordered the case remanded to state court. *Id.* at 74, 89; see 28 U.S.C. 1447(c).

3. On remand to the state court, Tulane removed the action to district court under Section 1442(a)(1) as a "person acting under" a federal officer: namely the Director of NIH. 954 F.2d at 268.[2] The district court remanded the case to state court, however, holding that Tulane could remove the action under Section 1442(a)(1) only if the state court first determined that NIH was an indispensable party under Louisiana law. 954 F.2d at 268.

Tulane petitioned the Fifth Circuit for a writ of mandamus directing the district court to vacate its remand order. The Fifth Circuit granted the petition, holding that the district court "must decide for itself whether Tulane satisfies the two requirements of § 1442(a)(1), *i.e.*, that Tulane is a 'person acting under' an officer of the United States and that its acts are 'under color of such office.'" 954 F.2d at 270. Thereafter, the district court allowed extensive discovery on whether Tulane met those requirements.

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[2] After removing the case, Tulane moved to have the Director of NIH and the Secretary of the Department of Health and Human Services added as parties, and petitioners moved to dismiss NIH as a defendant and to remand the case to state court. 954 F.2d at 268. The district court found it unnecessary to rule on those motions in light of its holding that Tulane was entitled to remove the case. Pet. App. A11 n.2.

On respondents' motion for summary judgment, the district court held that "removal by Tulane was proper under 28 U.S.C. § 1442(a)(1) and that the [respondents'] motion for summary judgment has merit." Pet. App. A6. With respect to removal, the court determined that "sufficient facts have now been submitted to establish that Tulane satisfies the two requirements of [Section 1442(a)(1)], namely that, at all material times, Tulane was and is a 'person acting under' the Director of the NIH, an officer of the United States, and that its acts are 'under color of such office.'" Pet. App. A7. The district court explained that the "depositions and exhibits amassed since the appellate decisions flesh out the details of this controversy but do not alter the conclusion that these privately owned monkeys have been in federal custody for over ten years and that the NIH and its officers have a continuing custodial, financial and research interest in these monkeys." *Id.* at A10.

With respect to standing, the district court stated that, although "there may no longer be an extant Fifth Circuit decision on standing in this case, the Court cannot ignore the fact that the Fifth Circuit has already decided in this very case that there was a federal interest presented and that these plaintiffs do not meet the constitutional requirements for standing to act as advocates for the monkeys' interest." Pet. App. A10. The district court determined that the facts relevant to standing "have not changed since the Fifth Circuit handed down [*IPPL*, 895 F.2d 1056 (1990)], and this Court has been presented with no reason why the Fifth Circuit would now reach a different conclusion upon those same allegations and those same facts." Pet. App. A10-A11. The district court accordingly granted summary

judgment for respondents and dismissed the case. *Id.* at A11.

4. The Fifth Circuit affirmed. Pet. App. A1-A4. It held, first, that Tulane was entitled to remove the action under Section 1442(a)(1). It determined that Tulane is a "person" for purposes of Section 1442(a)(1), because the term "person," as used in that provision, is not limited to natural persons but also includes corporations and similar legal entities. Pet. App. A2. It further determined that Tulane was "acting under" the Director of NIH, an officer of the United States, in carrying out its contract with NIH to care for the monkeys. *Id.* at A3.

The Fifth Circuit next held that petitioners were required to establish Article III standing but had failed to do so. The court said: "The Supreme Court reversed our judgment on a federal *agency's* right to remove under § 1442(a)(1), but left intact our ruling on standing. We are, therefore, bound by our previous holding under the 'law of the case' doctrine." Pet. App. A4.

5. NIH has informed us of the following: Only two monkeys are now housed at Tulane's Primate Research Center. One is a member of the control group of monkeys and thus has never undergone deafferentation. NIH does not plan to use that monkey in any experiments on neural functions. The other monkey had a forelimb deafferented and later amputated. When euthanasia becomes the humane course for that monkey, NIH plans to conduct the same experimental protocol on it that NIH performed on the other monkeys.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or that of any other court of appeals. Further review therefore is not warranted.

1. The court of appeals correctly held that petitioners must have Article III standing to assert their claims in federal court. Pet. App. A4.[3] The Constitution limits the power of the federal courts to deciding "[c]ases" and "[c]ontroversies." U.S. Const. Art. III, § 2. Standing "is an essential and unchanging part of the case-or-controversy requirement." *Lujan* v. *Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992). Thus, if the party seeking relief from a federal court does not have Article III standing, there is no "case" or "controversy" with respect to which the federal court has power to grant such relief.

Petitioners argue, however, that a plaintiff whose case is removed to federal court under 28 U.S.C. 1442(a)(1) need not have Article III standing to assert state-law claims. This Court in *IPPL* v. *Administrators of Tulane Educ. Fund*, 500 U.S. 72, 78 n.4 (1991), found it unnecessary to decide that issue. There is likewise no need to decide the issue at this point, because it is not the subject of a conflict among the lower courts.

In any event, there is no merit to petitioners' claim that a federal court, in a case removed under Section 1442(a)(1), may award relief to a plaintiff who lacks

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[3] In this Court, petitioners challenge only the Fifth Circuit's holding that they were required to satisfy Article III standing requirements. They do not seek further review of the Fifth Circuit's holding that they did not satisfy those requirements. Although petitioners object (Pet. 12-15) to the Fifth Circuit's grounding of that holding on the "law of the case" doctrine, they correctly concede (Pet. 15) that the Fifth Circuit's application of that doctrine does not warrant further review. In any event, the Fifth Circuit correctly held in its prior decision that petitioners lack Article III standing, 895 F.2d at 1059-1061, and this Court declined to review that holding, 500 U.S. at 78 n.4. There is no reason for a different course here.

Article III standing. Section 1442(a)(1) does not dispense with the requirement that a plaintiff have Article III standing to obtain relief in a federal court. Indeed, Congress cannot, by any statute, expand the Article III jurisdiction of the federal courts. See *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 372 (1982). Furthermore, the fact that state law gives a plaintiff standing in state court does not permit a *federal* court to award relief if the plaintiff lacks Article III standing. See *Waller* v. *Georgia*, 467 U.S. 39, 44 n.3 (1984); see also *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 804 (1985) ("Standing to sue in any Article III court is * * * a federal question which does not depend on the party's prior standing in state court.").

Petitioners point out (Pet. 8) that, to remove an action under Section 1442(a)(1), the defendant must assert a colorable federal defense so that the case "arises under" federal law, as required by Article III. See *Mesa* v. *California*, 489 U.S. 121, 136 (1989); *Tennessee* v. *Davis*, 100 U.S. 257, 264 (1880). Petitioners reason that, because "this was already an Article III case by virtue of the federal defense, dispensing with Article III's standing requirement would have no jurisdictional consequence." Pet. 8.

Petitioners erroneously confuse the "arising under" requirement of Article III with the "case or controversy" requirement of Article III. Article III's standing requirement is an element of its "case or controversy" requirement. *Lujan*, 112 S. Ct. at 2136. Thus, although the assertion of a colorable federal defense satisfies the "arising under" requirement of Article III, it does not satisfy the standing requirement. That is why, even if an action "arises under" federal law, and is therefore within a federal court's federal question jurisdiction (28 U.S.C. 1331), the action is not one that

federal courts have power to entertain if the plaintiff lacks Article III standing. See, *e.g.*, *Lujan* v. *Defenders of Wildlife*, 112 S. Ct. 2130, 2135-2136 (1992) (applying Article III standing in federal question case); *M.A.I.N.* v. *Commissioner, Maine Dep't of Human Servs.*, 876 F.2d 1051, 1052-1053 (1st Cir. 1989) (applying Article III standing in case removed under 28 U.S.C. 1441). Consequently, respondents' assertion of a colorable federal defense does not obviate the need for petitioners to establish Article III standing to seek relief in federal court.

Petitioners also argue, relying upon *ASARCO, Inc.* v. *Kadish*, 490 U.S. 605, 618 (1989), that they need not meet Article III standing requirements because they were not "the party attempting to invoke the federal judicial power." Pet. 9. Petitioners' reliance upon *ASARCO* is misplaced.

In *ASARCO*, the State's highest court issued a judgment in favor of plaintiffs who lacked Article III standing, and the defendant sought review in this Court. This Court held that review was appropriate, because the adverse state judgment gave the defendant/petitioner sufficient injury-in-fact to provide Article III standing. *ASARCO*, 490 U.S. at 618. The fact that the plaintiffs did not have standing did not prevent review because "they [we]re not the party attempting to invoke the federal judicial power." *Ibid.*; see also *Northeastern Florida Chapter of Associated Gen. Contractors* v. *City of Jacksonville*, 113 S. Ct. 2297, 2303 n.4 (1993).

ASARCO is inapposite here. In *ASARCO*, the Court was not called upon to award affirmative relief to a party who lacked Article III standing. Rather, the Court's review was limited to the issue upon which the petitioner/defendant had standing—whether the adverse state court decision should be reversed. In a case

removed under Section 1442, by contrast, the federal courts are called upon to award affirmative relief to the plaintiff. Even though the plaintiff did not bring the case in federal court initially, the fact remains that, if the plaintiff lacks Article III standing, there is no federal "case" or "controversy" with respect to the plaintiff's request for affirmative relief.[4]

Indeed, petitioners' argument that Article III standing is not required unless the plaintiff "invokes" the federal judicial power would apply to *every* type of removal—including federal question removal under 28 U.S.C. 1441[5]—because the defendant in a removed case will always be the party who first invokes the federal judicial power. Yet courts routinely, and properly, require that the plaintiff in a federal question removal case have Article III standing. See, *e.g.*, *M.A.I.N.*, 876 F.2d at 1052-1053.

The application of Article III standing requirements to plaintiffs in removed cases will not send state law "into oblivion," as petitioners assert (Pet. 10). A plaintiff remains free to bring state-law claims in state court

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[4] In *IPPL*, this Court held that petitioners had standing to seek review in this Court of the Fifth Circuit's holding that NIH was entitled to remove the case, without regard to whether petitioners had standing to pursue their underlying state-law claims for affirmative relief. 500 U.S. at 78 n.4. Accordingly, we do not challenge petitioners' standing to seek review of the Fifth Circuit's decision below holding that Tulane was entitled to remove the case. Our submission, instead, is that petitioners were required to have Article III standing to obtain relief on their underlying state-law claims.

[5] 28 U.S.C. 1441 authorizes the removal of "any civil action brought in a State court of which the district courts of the United States have original jurisdiction," 28 U.S.C. 1441(a), including civil actions "founded on a claim or right arising under the Constitution, treaties or laws of the United States," 28 U.S.C. 1441(b).

against private parties who are not acting under a federal officer, and to take advantage of any less stringent standing requirements applicable in the state court. When a plaintiff sues a federal officer or person acting under a federal officer, however, the defendant has a right to remove the case if the defendant asserts a colorable federal defense. *Arizona* v. *Manypenny*, 451 U.S. 232, 242 (1981). Once the defendant exercises that right, the federal court has the power to adjudicate the case only within the constraints of Article III.[6]

Arizona v. *Manypenny*, *supra*, does not support a contrary conclusion, as petitioners assert (Pet. 10-11). The Court there held that "in a criminal proceeding removed to federal court, a State may appeal under [28 U.S.C.] § 1291 from an adverse judgment if statutory authority to seek such review is conferred by state law." *Manypenny*, 451 U.S. at 250. The Court emphasized that the state law authorizing the State to appeal in a criminal case was necessary, but not sufficient, to give the State the right to appeal in a federal forum; instead, "some independent federal basis," which the Court found in 28 U.S.C. 1291, "is required if a State is to perfect its appeal." *Manypenny*, 451 U.S. at 244. The Court explained that state law "does not affect the exclusively federal character of the forms of review available once the state sovereign enters federal court," *id.* at 249 n.26, and thus federal review is available only "within constitutional constraints," *id.* at 249. So too here, it was not sufficient for petitioners to establish standing under state law to pursue their claims; rather, federal

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[6] Contrary to petitioners' contention (Pet. 9), it is irrelevant whether the application of Article III standing requirements would serve the purposes of Section 1442, because those requirements are imposed by the Constitution.

adjudication of those claims was available only "within constitutional constraints," including those imposed by Article III.[7]

2. a. The Fifth Circuit correctly held that Tulane was entitled to remove this case under 28 U.S.C. 1442(a)(1) as a "person acting under" a federal officer. In so holding, the court correctly rejected petitioners' argument that the term "person" in Section 1442(a)(1) is limited to natural persons and does not include corporations and similar legal entities such as Tulane. Moreover, the Fifth Circuit's holding accords with that of every other court of appeals to address the issue, as petitioners concede (Pet. 20).

i. The Dictionary Act, 1 U.S.C. 1, establishes a presumption that the term "person," when used in a federal statute, is not limited to natural persons:

> In determining the meaning of any Act of Congress, unless the context indicates otherwise—
>
> * * * * *
>
> the words "person" and "whoever" include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.

Congress intended the rules of interpretation set forth in the Dictionary Act to "apply across-the-board except where the Act [to be interpreted] by its terms called for a

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[7] Petitioners err in citing Professors Wright and Miller for a contrary proposition. Pet. 11-12. Professors Wright and Miller say that "state rules that recognize standing *need not be honored* if Article III requirements are not met." 13A C. Wright, A. Miller & C. Cooper, *Federal Practice and Procedure* § 3531.14, at 91 (2d ed. 1984) (emphasis added).

deviation from this practice." *Monell* v. *Department of Social Servs.*, 436 U.S. 658, 689 n.53 (1978).

Petitioners concede that the Dictionary Act's rule that a "person" includes entities other than natural persons applies to Section 1442(a)(1) "unless the context requires otherwise." See Pet. 16-17. They contend, however, that a more restrictive interpretation is required by the text, history, and purpose of Section 1442. That contention is incorrect.

The text of Section 1442(a) strongly suggests that the term "person" in Section 1442(a)(1) is *not* limited to natural persons. The opening paragraph of Section 1442(a) authorizes removal by "any of the following persons." Included among the listed "persons" who may remove an action is, under Section 1442(a)(2), "[a] property holder whose title is derived from [an officer of the United States]." 28 U.S.C. 1442(a)(2). Obviously, property can be held by, and titled in, corporations, partnerships, trusts, and other non-natural entities. Therefore, the most natural interpretation is that the term "persons," for purposes of Section 1442(a)*(2)*, includes non-natural persons. The same word "persons" refers to the entities entitled to remove under Section 1442(a)*(1)*, the subsection under which this action was removed; the term must, under well-settled canons of construction, be construed to mean the same thing for purposes of Section 1442(a)(1) as it means for purposes of Section 1442(a)(2), and thus to include entities other than natural persons. See, *e.g.*, *Sullivan* v. *Stroop*, 496 U.S. 478, 484 (1990). Accordingly, Section 1442 provides evidence "independently indicat[ing] the broad reading" (*Rowland* v. *California Men's Colony*, 113 S. Ct. 716, 725 (1993)) of the term "person" called for under the Dictionary Act.

Petitioners err in resorting to the legislative history of Section 1442 for evidence to overcome the Dictionary Act's rule that "person" is not limited to natural persons. Because the Dictionary Act directs courts to apply its rules of interpretation "unless the context indicates otherwise" (1 U.S.C. 1), courts must limit their examination to the statutory text in which the term at issue is found. See *Rowland*, 113 S. Ct. at 720 ("If Congress had meant to point further afield, as to legislative history, for example, it would have been natural to use a more spacious phrase, like 'evidence of congressional intent,' in place of 'context.'"). Thus, petitioners' reliance on legislative history is misplaced.

In any event, nothing in the legislative history of Section 1442 suggests that the term "person" is limited to natural persons. Congress adopted the modern version of Section 1442 in the 1948 revision of the Judicial Code. The legislative history of that recodification contains only one brief paragraph concerning Section 1442, which, not surprisingly, does not address the question presented here:

> The revised subsection (a)(1) is extended to apply to all officers and employees of the United States or any agency thereof. [The previous statute] was limited to revenue officers engaged in the enforcement of the criminal or revenue laws.

H.R. Rep. No. 308, 80th Cong., 1st Sess. A134 (1947). Petitioners simply misread that paragraph when they assert that "[t]he comment's reference to a 'person acting under' as an 'employee' is more consistent with an individual working directly for the government than a corporation acting pursuant to a contractual arrangement." Pet. 18. In fact, the paragraph does not contain any reference whatsoever to the statutory phrase

"person acting under"; much less does it expressly equate a "person acting under" a federal officer to a federal employee, as petitioners would have it. Furthermore, assuming *arguendo* that the paragraph, though not explicit on the matter, implies a similarity between "person[s] acting under" a federal officer and federal employees, it does not answer the question whether such "person[s]" can only be natural persons. In sum, the paragraph of the committee report upon which petitioners rely, construed most favorably to petitioners, is ambiguous with respect to the question presented here. It therefore cannot overcome the Dictionary Act's rule and the text of Section 1442, both of which both establish that the term "person" in Section 1442 is not limited to natural persons.

Nor can petitioners find support for their position in the absence of case law concerning removal by non-natural persons under prior versions of the federal officer removal statute. See Pet. 17 n.4. The presumption that the term "person" includes non-natural entities is longstanding, as reflected by the fact that when the Dictionary Act was enacted in 1871, it included the presumption. See Act of Feb. 25, 1871, ch. 68, § 2, 16 Stat. 431. It therefore does not represent a "sweeping" change in the law, as petitioners assert (Pet. 19), to apply that presumption in interpreting Section 1442(a)(1).[8]

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[8] Moreover, when Congress enacted the current version of Section 1442 in 1948, it also amended the Dictionary Act to ensure that "person" includes "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." See Act of June 25, 1948, ch. 645, § 6, 62 Stat. 859. If Congress had intended to limit the reach of the phrase "person acting under" in Section 1442(a)(1), it presumably would have made that intention plain in the text of that statute.

Petitioners also err in suggesting that the purpose of Section 1442 supports their restrictive interpretation of "person." See Pet. 19. To the contrary, the purpose of Section 1442 and its predecessors, as described by this Court, supports removal by non-natural persons acting under federal officers:

> [The government] can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a State court, for an alleged offence against the law of the State, yet warranted by the Federal authority they possess, and if the general government is powerless to interfere at once for their protection,—if their protection must be left to the action of the State court,—the operation of the general government may at any time be arrested at the will of one of its members.

Tennessee v. *Davis*, 100 U.S. at 263 (discussing predecessor of Section 1442); see also *Arizona* v. *Manypenny*, 451 U.S. at 241 n.16 (Section 1442 reflects "the need to safeguard the exercise of legitimate federal authority."); *Willingham* v. *Morgan*, 395 U.S. 402, 406 (1969) (Section 1442 reflects "the very basic interest of the enforcement of federal law through federal officials"). The federal government carries out many statutory functions through private entities—from determining Medicare reimbursement, *Peterson* v. *Blue Cross/Blue Shield*, 508 F.2d 55 (5th Cir.), cert. denied, 422 U.S. 1043 (1975), to conducting electronic surveillance, see *Camacho* v. *Autoridad de Telefonos de*

Puerto Rico, 868 F.2d 482, 486-487 (1st Cir. 1989).[9] Those functions are subject to the threat of state interference whether carried out by natural persons or by the other entities listed in the Dictionary Act. See *Ryan* v. *Dow Chemical Co.*, 781 F. Supp. 934, 946 (E.D.N.Y. 1992).[10]

ii. The courts of appeals have uniformly held that corporations and similar non-natural entities are "persons" that, when sued in state court for actions carried out under a federal officer, may remove such suits to federal court under Section 1442(a)(1). In *Camacho* v. *Autoridad de Telefonos de Puerto Rico*, 868 F.2d 482, 486-487 (1989), for example, the First Circuit upheld removal under Section 1442(a)(1) by a telephone company that had conducted electronic surveillance at the direction of federal officers. In *Peterson* v. *Blue Cross/Blue Shield*, 508 F.2d 55, cert. denied, 422 U.S.

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[9] Petitioners err in contending that the decision below, by allowing non-natural persons to remove under Section 1442(a)(1), will cause an undue "expansion of federal jurisdiction to embrace a broad class of federal contractors." Pet. 20. As discussed in the next section, the decision below accords with all of the decisions by other courts of appeals addressing the same issue. Under those decisions, moreover, removal is limited to federal contractors who both act under the direction of a federal officer and assert a colorable federal defense. When a contractor meets those conditions, it does not represent an undue expansion of federal jurisdiction to recognize that the contractor has the right to a federal forum whether, for example, the contractor is a sole proprietorship—*i.e.*, a natural person—or a non-natural entity, such as a one-person corporation.

[10] Moreover, the immunity defenses of private, non-natural entities acting under federal officers present the same sort of "manipulable complexities" as those of individuals. *IPPL*, 500 U.S. at 87; see *Rochester Methodist Hosp.* v. *Travelers Ins. Co.*, 728 F.2d 1006, 1012-1015 (8th Cir. 1984); *Anderson* v. *Occidental Life Ins. Co.*, 727 F.2d 855, 856-857 (9th Cir. 1984); *Bakalis* v. *Crossland Sav. Bank*, 781 F. Supp. 140, 143 (E.D.N.Y. 1991).

1043 (1975), the Fifth Circuit upheld removal under Section 1442(a)(1) by a corporation that acted as a fiscal intermediary on behalf of the Secretary of Health and Human Services in the administration of the Medicare program. 508 F.2d at 58; see also *Texas ex rel. Falkner* v. *National Bank of Commerce*, 290 F.2d 229, 231 (5th Cir.) (upholding removal under Section 1442(a)(1) by two banks in action based on banks' performance of functions enumerated by Secretary of the Treasury), cert. denied, 368 U.S. 832 (1961).

The majority of district courts to address the issue likewise have held that non-natural entities are "persons" that may remove under Section 1442(a)(1). See, *e.g.*, *Pack* v. *AC & S, Inc.*, 838 F. Supp. 1099, 1102-1103 (D. Md. 1993) (manufacturer of turbine generators for the Navy); *Fung* v. *Abex Corp.*, 816 F. Supp. 569, 572 (N.D. Cal. 1992) (corporation); *Bahrs* v. *Hughes Aircraft Co.*, 795 F. Supp. 965, 968 (D. Ariz. 1992) (government contractor); *Ryan* v. *Dow Chemical Co.*, 781 F. Supp. 934, 941-947 (E.D.N.Y. 1992) (corporation); *Bakalis* v. *Crossland Sav. Bank*, 781 F. Supp. 140, 143-144 (E.D.N.Y. 1991) (bank); *Neurological Assocs.* v. *Blue Cross/Blue Shield*, 632 F. Supp. 1078, 1080 (S.D. Fla. 1986) (private insurance company); *Group Health, Inc.* v. *Blue Cross Ass'n*, 587 F. Supp. 887, 890 (S.D.N.Y. 1984) (same).

The few district court decisions to the contrary are incorrect and unpersuasive. In *Krangel* v. *Crown*, 791 F. Supp. 1436 (S.D. Cal.), appeal denied, 968 F.2d 914 (9th Cir. 1992), the court recognized that the language of Section 1442(a)(1) indicates that the term "person" includes corporations, but the court held that "the purpose of the statute suggests a different result than its language." 791 F. Supp. at 1446. The court determined that "the purpose of § 1442(a)(1) is to protect

individual officers," and not to protect government contractors. See *id.* at 1442. The *Krangel* court's abandonment of the text of the statute is indefensible, and its understanding of the purpose of the removal statute is flawed (see pp. 17-18, *supra*).

Two other district courts have erroneously relied on decisions holding that federal *agencies* cannot remove under Section 1442(a)(1) to conclude that non-natural entities cannot do so. See *Gensplit Fin. Corp.* v. *Foreign Credit Ins. Ass'n*, 616 F. Supp. 1504, 1508-1510 (E.D. Wis. 1985); *C.H.* v. *American Red Cross*, 684 F. Supp. 1018, 1023-1024 (E.D. Mo. 1987) (adopting the reasoning of *Gensplit*). When this Court held that a federal agency cannot be a "person acting under" a federal officer, *IPPL*, 500 U.S. at 82-84, however, it did not hold that "person" in Section 1442 is limited to natural persons. Rather, the Court reasoned that if Congress had intended to give removal authority to federal agencies, it would not have expressed this intent so obliquely, by referring to agencies merely as entities "acting under" the agency heads. 500 U.S. at 82. The Court also applied the rule of statutory interpretation that the term "person" ordinarily does not include the sovereign. *Id.* at 82-83; see also, *e.g.*, *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 64 (1989). Neither of those reasons supports the conclusion that the term "person" cannot include the private, non-natural entities listed in the Dictionary Act.[11]

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[11] The Court in *IPPL* also reasoned that Congress could rationally permit federal officers, but not federal agencies, to remove actions against them because the immunity of agencies, in contrast to that of officers, ordinarily is a straightforward issue. 500 U.S. at 85. As noted above (note 10, *supra*), that reasoning does not justify treating natural persons acting under federal officers differently from non-natural entities acting under federal

b. Petitioners also argue (Pet. 20-27) that, even if Tulane is a "person" for purposes of Section 1442(a)(1), it could not remove this action because, with respect to the conduct on which this action is based, it was not "acting under" a federal officer, as required for removal under that provision. A private party "act[s] under" a federal officer, for purposes of Section 1442(a)(1), if the officer directs or otherwise exercises substantial control over the private party's actions. See, *e.g.*, *Camacho*, 868 F.2d at 486; *Peterson*, 508 F.2d at 57. In caring for the monkeys, Tulane acted primarily under the direction of NIH Deputy Director Dr. William Raub and therefore satisfied the "acting under" requirement.

Petitioners do not take issue with the findings below that Tulane could not act with respect to the monkeys without the permission of NIH officials. See Pet. 21. Nor do petitioners challenge the finding below (Pet. App. A3) that Tulane acted "strictly as an aide to NIH in its role as custodian" of the monkeys. Pet. 21. Instead, petitioners argue that a person cannot "act under" a federal officer unless that federal officer has "ultimate control" over the relevant subject matter. Pet. 20-25. Petitioners claim that NIH officials did not have such control, because the monkeys belonged to IBR, and NIH was only their custodian. Pet. 21. That fact-bound claim has been rejected by both courts below and does not warrant further review.

In any event, petitioners' argument lacks merit. Petitioners cite instances in the record in which IBR reiterated its ownership rights over the monkeys and NIH officials acknowledged those rights. See Pet. 21-22.

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officers. Both sorts of "persons" may assert immunity defenses of sufficient complexity that Congress could reasonably have concluded that they should be resolved in a federal forum.

That evidence, however, does not support petitioners' assertion that IBR "alone had the authority to decide the course of action to be taken." Pet. 22. Moreover, there is ample evidence in the record that NIH has substantial authority over the monkeys. The record shows that NIH officials decided (in consultation with IBR) to transfer the monkeys to Tulane. Joseph Brady Dep. 39. It also shows that NIH officials played a major role in directing the research on the monkeys, reviewing and editing the research protocol, and convening a panel of independent experts to make recommendations concerning the health and physical status of the monkeys. Wm. Raub Dep. 225-226. NIH also provided funds that supported the care of and experiments on the monkeys from operating funds of the Office of the Director of NIH. *Id.* at 95.

c. Finally, petitioners argue that Tulane has not shown that it acted under a single federal "officer," rather than several federal officers. Pet. 26-27. That fact-bound argument does not merit further review. As noted above, and as the record upon which the district court relied (Pet. App. A7) amply demonstrates, Tulane acted primarily under one NIH officer, Dr. Raub. Dr. Raub signed the agreement with Tulane for care of the monkeys, approved the research protocol, and convened a panel of experts to make recommendations on the health and welfare of the monkeys. Dr. Raub also made the decision to transfer the monkeys to Tulane. Raub Decl. 2; Raub Dep. 266, 390-391.

Moreover, petitioners offer no legal support for their argument that Tulane had to identify one, and only one, federal officer that it was "acting under." Nor does common sense support such a requirement. The heads of federal agencies, like the heads of corporations, must delegate duties to subordinates. Moreover, many such duties require coordination among numerous federal

officials. It was therefore sufficient for Tulane to show that it acted primarily under Dr. Raub to remove this case under Section 1442(a)(1).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Supreme Court of the United States

October Term, 1994

INTERNATIONAL PRIMATE PROTECTION LEAGUE AND ITS MEMBERS, PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS AND ITS MEMBERS, ALEX PACHECO, AND LOUISIANA IN SUPPORT OF ANIMALS AND ITS MEMBERS,

Petitioners,

versus

ADMINISTRATORS OF TULANE EDUCATIONAL FUND, NATIONAL INSTITUTES OF HEALTH AND THE INSTITUTES FOR BEHAVIOR RESOURCES, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF FOR PETITIONERS INTERNATIONAL PRIMATE PROTECTION LEAGUE, *et al.*

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REPLY BRIEF

A. THE FEDERAL DEFENSE IS THE ONLY ARTICLE III "CASE OR CONTROVERSY" THIS CASE PRESENTS; AND PETITIONERS HAVE STANDING TO CHALLENGE IT

Petitioners have noted that in an action removed to federal court under 28 U.S.C. § 1442(a) the existence of a federal defense is a constitutional prerequisite, for without it there is no Article III "case or controversy". *See, Mesa v. California*, 489 U.S 121, 136, 109 S.Ct. 968 (1989). (Petition, at pp. 6-12). In its opposition brief NIH charges that Petitioners "erroneously confuse the 'arising under' requirement of Article III with the 'case or controversy' requirement of Article III." (NIH Opposition, p. 9). In NIH's view, after satisfying the "arising under" requirement (or presumably some other Article III basis for a "case or controversy"), the plaintiff must yet meet Article III standing requirements which, in the words of *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130, 2136 (1992), are "an essential and unchanging part of the case-or-controversy requirement." This may be so; but the fundamental flaw in NIH's reasoning comes when it carries its argument one step farther – to a conclusion that Petitioners can satisfy Article III's standing requirements only by reference to their *state-law claims*. Whether Petitioners have Article III standing with respect to their state law claims is irrelevant to determining whether they satisfy the "case or controversy" requirement.

As this Court determined in *Mesa*, the "case or controversy" requirement is met in a § 1442(a)(1) case by the assertion of a federal defense. There is in this case only

one federal controversy – the sovereign immunity defense asserted by Respondent Tulane, which "arises under" the Constitution. The federal defense is the only Article III "case or controversy" this case presents. Therefore, if NIH is correct in contending that Petitioners must also establish Article III standing as an element of the "case or controversy" requirement, their standing must be evaluated in terms of what presents, in this case, the actual case or controversy, *viz.*, the sovereign immunity defense.

As this Court observed in *IPPL*, "standing is gauged by the specific common-law, statutory or constitutional claims that a party presents." 500 U.S. 72, 77, 111 S.Ct. 1700, 1704. Thus, the Court continued, reference must be made to *"the particular claims asserted." Id.* (emphasis in original). The issue arose in *IPPL* when NIH objected that Petitioners' lack of standing to pursue their state-law claims (as determined by the Fifth Circuit under Article III) divested this Court of jurisdiction to address the removal question on which *certiorari* had been granted. In dismissing NIH's contention, this Court properly looked *not* to the Petitioners' standing to seek protection of the monkeys (the underlying state claim), but rather, to their standing to challenge the removal. Significantly, it was the challenge to removal that presented the federal "case or controversy"; and applying traditional standing analysis, the Court determined that Petitioners had suffered "clear . . . injury" in the loss of their right to sue in the forum of their choice, which injury could be "fairly . . . traced" to NIH's removal and which would "likely . . . be redressed" if Petitioners prevailed because the case would be remanded. *Id. Cf., Asarco, Inc. v. Kadish*, 490 U.S.

605, 109 S.Ct. 2037 (1989) (standing to appeal decision on federal question not affected by lack of standing on underlying claim).

A similar analysis is warranted here. The assertion of a federal defense has injured Petitioners, authorizing the removal of their action from state court and the dismissal of their claims; the injury can be fairly traced to Tulane's assertion of the defense; and the injury is likely to be redressed if Petitioners prevail on their claim that the federal defense lacks merit because, if the sovereign immunity defense is found invalid, the Court may either decline to exercise jurisdiction over the pendent state law claims and remand to state court, or permit the action to go forward in federal court. Therefore, Petitioners clearly have standing to challenge the sovereign immunity defense. Petitioners' standing under Article III to seek protection of the monkeys or damages for their harm is no more relevant here than it was when this Court determined Petitioners' standing to challenge the removal in *IPPL*.

Indeed, assuming Petitioners' state claims satisfied Article III standing requirements, there still would be no federal "case or controversy" with respect to their requests for affirmative relief, simply because they do not fit within any Article III category.[1] Accordingly, the problem NIH poses – the lack of an Article III "case or

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[1] Article III, § 2 delineates "cases" and "controversies" which do not encompass Petitioners' state law claims:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all cases affecting Ambassadors, other public Ministers and

controversy" – cannot be resolved by NIH's proffered means – satisfaction of Article III standing requirements: a state-law claim held to federal standing requirements would remain neither a federal question, a diversity action, an admiralty suit, nor any other recognized "case" or "controversy."

Moreover, dismissal, the remedy which Respondents urge (and which the Fifth Circuit employed) for a perceived lack of subject matter jurisdiction, is legally unavailable. 28 U.S.C. § 1447(c) allows no discretion to dismiss rather than remand an action. Where subject matter jurisdiction is lacking, the statute declares that the removed case "*shall* be remanded." *IPPL*, 500 U.S. at 89, 111 S.Ct. at 1710 (emphasis in original). However, the right of the federal officer (or person acting under him) to have his defense heard in federal court makes remand on standing grounds an unsatisfactory option – albeit the only option. This apparent conundrum serves to point up the error of Respondents' analysis, which stems from the improper application of Article III standing guidelines to Petitioners' claims. Were attention properly focused on the federal defense – the basis of federal jurisdiction – then subject matter jurisdiction would clearly exist for consideration of the federal defense. If the defense were

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Consuls; – to all Cases of admiralty and maritime jurisdiction; – to Controversies to which the United States shall be a party; – to Controversies between two or more States; – between Citizens of different States; – between Citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof; and foreign States, Citizens or Subjects.

found unmeritorious, subject matter jurisdiction might be lost, a circumstance legitimately warranting remand.

For these reasons, the Court carefully framed its "open question" in footnote 4: "whether a federal court in a § 1442(a)(1) removal case *may* require plaintiffs to meet Article III's standing requirements with respect to the state-law claims over which the federal court exercises *pendent* jurisdiction." 500 U.S. at 78, n.4, 111 S.Ct. at 1705, n.4 (emphasis supplied). If Article III standing were a constitutional prerequisite to the assertion of Petitioners' state law claims, this Court would not have used the discretionary "may" in describing the issue; discretion is allowed precisely because the court exercises only "pendent" jurisdiction over the state-law claims in a § 1442(a)(1) removal case – the federal defense provides the case or controversy on which federal jurisdiction is premised.

Erroneously applying Article III standing requirements to Petitioners' state claims, neither the district court nor the Fifth Circuit have ever addressed the question raised by this Court. It is a question Respondents urge this Court to overlook, given the absence of any conflict among the circuits.[2] However, the disregard

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[2] Respondents IBR and Tulane further suggest that the issue was not raised in the district court. They point to the portion of Petitioners' brief raising a "different argument", which Respondents seem to suggest was the only argument. (IBR/Tulane Opposition, p.10). In the section immediately preceding that cited by Respondents, however, Petitioners specifically and at some length addressed the applicability of federal standing law to their state law claims. (Opposition Memorandum at 68-72). This issue was properly preserved for appeal.

demonstrated for the question raised by this Court has created its own conflict, resulting in an error of constitutional proportions and one that has done unnecessary violence to Louisiana law and the rights of these Petitioners.

This last element – of violence to state law and Petitioners' rights – provides the proper answer to the question the Court raised. Because § 1442(a)(1) seeks only to provide a federal forum, seeks not to displace the substantive laws of the states, and seeks neither to enlarge nor contract the rights of the parties, *Mesa v. California, supra, Arizona v. Manypenny*, 451 U.S. 232, 247, 101 S.Ct. 1657, 1664 (1981), an interpretation of the statute that results in the dismissal of state law claims maintainable in state court should not be countenanced. The fact that the state claims were dismissed for nonsatisfaction of federal standing requirements without any consideration of the validity of the federal defense which brought the case to federal court – the only federal controversy – emphasizes the error of the Fifth Circuit's interpretation of § 1442(a)(1).

Indeed, the draconian finality of the lower courts' remedy distinguishes the § 1442(a) removal from a § 1441 removal of a diversity or a federal question case. NIH, Tulane, and IBR suggest, with scant authority, that the federal courts routinely apply Article III standing requirements to such claims removed from state court. Be that as it may, the remedy for a failure of federal standing is simply remand to state court.[3] *See, M.A.I.N. v. Commissioner, Maine Dept. of Human Services*, 876 F.2d 1051 (1st

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[3] Respondents point to the decision in *International Primate Protection League v. Institute for Behavioral Research, Inc.*, 799 F.2d

Cir. 1989); *Mangini v. R.J. Reynolds Tobacco Co.*, 793 F.Supp. 925 (N.D. Cal. 1992). The application of Article III standing requirements in those cases can affect only the forum. By contrast, the Fifth Circuit determined that in a § 1442(a) removal case, a standing defect leads not to remand but to dismissal, with prejudice, of the plaintiff's claims. See *IPPL*, 895 F.2d. 1056, 1061 (5th Cir. 1990). The Fifth Circuit reasoned that a § 1442(a)(1) case cannot be remanded because the federal officer (or perhaps agent) has an absolute *right* to a federal forum for the adjudication of his defense; the Court did not advert to the unavailability of dismissal under § 1447(c).[4]

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934 (4th Cir. 1986) ("*IBR*"), as if the case were on all fours with the present case and supported the result below. In *IBR*, the plaintiffs brought suit in a Maryland state court, asserting state law claims *combined* with a claim under the federal Animal Welfare Act, 7 U.S.C. § 2131, *et seq.* Removal was uncontested, but the court found that it was supported by the federal claim. Concluding that the plaintiffs had no standing to sue under the Animal Welfare Act, which in any case was not subject to private enforcement, the court dismissed the suit. With respect to the state-law claims, however, the Fourth Circuit made plain that it could not exercise pendent jurisdiction given the failure of the federal claim; the dismissal was without prejudice to the plaintiffs' rights to re-urge their state claims. 799 F.2d at 940-941. Because the monkeys were transported to Louisiana, the state-law claims were ultimately asserted under Louisiana, not Maryland law.

[4] Were a lower court to do the wrong thing in the right way – *remanding* upon a finding that the plaintiff lacked Article III standing to pursue his claims – the issue would be unappealable. This Court's review is warranted to establish the applicable rule of law.

That dismissal was ordered in this case before the federal defense was addressed – forever foreclosing consideration of the federal controversy – due to the improper application of Article III standing requirements to Petitioners' state law claims was an unconscionable error warranting this Court's grant of *certiorari*.

B. REMOVAL WAS IMPROPER; TULANE DID NOT "ACT UNDER" NIH WITHIN THE MEANING OF 28 U.S.C. § 1442(a)

Respondents contend that the issue whether Tulane acted under an officer of the United States is a "fact-bound" issue unworthy of this Court's review. Because the lower courts neither reached nor decided important legal questions presented by Tulane's removal, the factual determinations below were incomplete and nondispositive. No consideration was given to the question whether it is possible to "act under" an officer who himself lacks control. Therefore, NIH incorrectly argues that Petitioners' contention was "rejected." (NIH Opposition, p. 21). Instead, the lower courts permitted NIH to confer federal jurisdiction on Tulane by its support for the removal, regardless of the nonexistence of any genuine federal interest that would warrant the exercise of federal jurisdiction. The fact that NIH's authority over the monkeys was completely circumscribed by a private entity presents a question of law the lower courts improperly avoided.

A related irregularity arose from the fact that no single federal officer exercised control over Tulane. Were the shifting involvement of federal officers attributable,

as NIH suggests in brief, to the delegation of authority by an agency head to his subordinates (NIH Opposition, p. 22), the multiplication of officers would be of no moment – and in any case the error in the removal petition could be cured by naming the supervising officer. In this case, however, the more amorphous shape of governmental involvement is far more troubling: federal employees, crossing agency lines, not answerable to one another, and working out of their homes and on weekends to support a *private* enterprise, with ultimate control residing in a *private entity* do not establish, as a matter of law, the presence of a federal interest apparently contemplated by § 1442(a).

The confusion in the lower courts surrounding the "acting under" requirement, combined with the improper broadening of federal jurisdiction to embrace this fundamentally private dispute, warrant this Court's review.

CONCLUSION

This Court's direction is needed on the proper interpretation of 28 U.S.C. § 1442(a) and on the standing requirements applicable to a § 1442(a) case.

Respectfully submitted,

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